Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THE HONORABLE JOHN MCBRYDE,

Petitioner,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX

(Vol. II of II)

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FIFTH CIRCUIT JUDICIAL COUNCIL

CONFIDENTIAL

DATE: DECEMBER 4, 1997

TO: MEMBERS OF THE FIFTH CIRCUIT JUDICIAL COUNCIL

SUBJECT: REPORT OF THE SPECIAL COMMITTEE OF THE FIFTH CIRCUIT JUDICIAL COUNCIL REGARDING COMPLAINTS AGAINST, AND THE INVESTIGATION INTO THE CONDUCT OF, JUDGE JOHN H. McBRYDE

I. INTRODUCTION

On July 10, 1995, David H. Martin, Esq., filed a complaint pursuant to 28 U.S.C. § 372(c) against Judge John H. McBryde, United States District Judge for the Northern District of Texas, with the Fifth Circuit Judicial Council. On September 13, 1995, Chief Judge Henry A. Politz referred that complaint to a Special Committee for investigation and also identified a letter from Assistant Attorney General Frank Hunger of the Department of Justice (relating to Judge McBryde's conduct in United States v. Satz) as a complaint against Judge McBryde pursuant to the provisions of 28 U.S.C. § 372(c)(1). Following the direction of 28 U.S.C. § 372(c)(4)(A), Chief Judge Politz appointed (in addition to himself, as specified in the statute) Circuit Judges W. Eugene Davis (Chairman) and Robert M. Parker, and District Judges William H. Barbour, Jr. and Edward C. Prado to constitute the members of the Special Committee.

The Special Committee retained Robert B. Fiske, Jr. of Davis Polk & Wardwell as Special Counsel to assist in the investigation of Judge McBryde.

In addition to these Section 372(c) complaints, others were later filed. On March 18. 1996 Mr. Rex Whiteaker, a Postal Inspector, filed a complaint against Judge McBryde arising out of United States v. Satz. James S. Byrom, Esq., filed a Section 372(c) complaint arising out of Judge McBryde's conduct

during the trial in United States v. Bates. These complaints were referred to the Special Committee and consolidated with the Martin and Hunger complaints.[1]

After the formation of the Special Committee in September 1995, there ensued for over two years activities and proceedings involving this Section 372(c) proceeding. The length of time of this proceeding, the scope of the factual hearing, and the aggregate demands placed on the Judiciary (just in terms of the time devoted by the members of the Special Committee, the Judicial Council, and various Article III Judges acting in their judicial capacities) have been substantial, if not unprecedented. As background for this Report, the Special Committee believes that the Judicial Council is entitled to a concise explanation of the events and activities that occasioned the extended period of twenty-seven months between the formation of the Special Committee and the proffer of this Report to the Council.

II. THE INVESTIGATION

From virtually the time of the formation of the Special Committee, its members became concerned about two things: first, that Judge McBryde may have a health problem (physical or mental) which affects his activities as a judge, and second, that Judge McBryde has engaged in a pattern of abusive behavior as a federal judge. The preliminary factual bases for these concerns, which emerged as general themes during the course of the investigation, arose from evidence received in an administrative hearing conducted by this same Special Committee in October 1995.[2] The Special Committee's concern that

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[1] A fifth complaint against Judge McBryde, filed by Howard Lee Carpenter on November 9, 1995, although similarly referred to and consolidated by the Special Committee, was eventually dismissed before the commencement of the evidentiary hearings.

The issues raised in the Byrom complaint involve the manner in which Judge McBryde conducts trials. The Special Committee heard a substantial amount of testimony on the subject of Judge McBryde's trial practices. That testimony and the Committee's findings are including in Part III.B.

[2] The Special Committee conducted an administrative hearing on the record in connection with Judge McBryde's Request for Assistance of the

Judge McBryde may be suffering from a mental or physical problem presented a delicate circumstance, because such a problem would mitigate against any finding the Special Committee might make regarding Judge McBryde's behavior. To supplement the judgment of the members of the Special Committee, Special Counsel submitted to an independent psychiatrist materials concerning Judge McBryde and asked for an expression of an opinion as to whether, based on these materials, the expert believed that a psychiatric examination of Judge McBryde was warranted. That expert reported his view that an examination was warranted. Out of an excess of caution rooted in concern for Judge McBryde, the Special Committee then approached, through Special Counsel, a second psychiatrist. He was furnished the same materials, and posed the same question, but he was not informed either of the fact that another psychiatrist had been presented with the same materials and asked the same question, or of the response. The second psychiatrist responded in the same fashion, indicating that a further examination was warranted.

After receiving the responses from the two independent psychiatrists that an examination was warranted, the Special Committee approached counsel for Judge McBryde to inquire whether Judge McBryde would consent to such an examination. Judge McBryde refused. His counsel countered that the materials that the Special Committee had referred to the two independent psychiatrists were misleading and incomplete. Out of an excess of caution, the Special Committee then separately submitted to the independent psychiatrists corrections and additional materials designated by Judge McBryde's counsel, including testimony given by Judge McBryde during a hearing before the Special Committee. After reviewing all the materials

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Judicial Council in connection with the assignment of two cases. At that hearing in October 1995, the Special Committee heard testimony from a federal judge, an Assistant U.S. Attorney and the Clerk of the Court for the Northern District of Texas, as well as Judge McBryde. That proceeding was distinct from the investigation pursuant to § 372(c), but facts adduced at that hearing formed the initial basis for the two concerns of the Special Committee set forth in the text.

as supplemented, the Special Committee received the same responses, independently, from the two experts — that an examination of Judge McBryde was warranted. In view of Judge McBryde's refusal to undergo such a examination, the Special Committee requested that the Judicial Council issue an order requiring that Judge McBryde be so examined. Judge McBryde requested and was given the opportunity to address the Judicial Council, urging that the order not issue. He objected on several grounds, including that due process required that he be able to challenge the factual predicate of the Special Committee's requested order (i.e., the factual bases for and the opinions of the two independent psychiatrists that a medical examination was warranted) before the Council could issue the order. On July 31, 1996, the Council entered an order requiring Judge McBryde to undergo such an examination. Judge McBryde again refused and commenced an action in the United States District Court for the Northern District of Texas seeking declaratory and injunctive relief that the investigation pursuant to § 372(c) was unconstitutional and that the Judicial Council's order that he undergo an examination was invalid because he had been denied due process in not being able to cross examine the psychiatrists. The Judicial Council thereupon commenced a proceeding in the same court pursuant to 28 U.S.C. § 332(d)(2) to enforce the order of the Judicial Council. Both of the proceedings in the District Court are under seal pursuant to § 372(c)(14).

When the Judicial Council's § 332(d) proceeding and Judge McBryde's complaint were filed, all of the District Judges in the Northern District recused themselves. Initially, Chief Judge Politz, pursuant to 28 U.S.C. § 292(b), appointed Judge Thomas M. Reavley to sit as a District Court Judge in these matters. Subsequently, Chief Judge Politz withdrew this order and, pursuant to the provisions of 28 U.S.C. § 291(b), sought an order from Circuit Justice Antonin Scalia designating a judge from within the Fifth Circuit to sit as a District Judge on these matters. Judge McBryde requested the appointment of a judge from outside the Fifth Circuit. Circuit Justice Scalia denied Judge McBryde's application and designated Judge Reavley to sit as the District Court Judge. Notwithstanding this designa-

tion, Judge McBryde moved to have Judge Reavley recuse himself, asserting, inter alia, that his friendship with, and his alleged dependence on continued certification by, Chief Judge Politz created the appearance of impropriety. Judge McBryde also argued that the sequence of events leading up to the appointment of Judge Reavley would "create suspicion" in the mind of a reasonable person that Judge Politz selected a judge whose views were consistent with his own and "then engaged in communications that led to the ratification of that selection by Justice Scalia." (Motion for Disqualification Pursuant to 28 U.S.C. § 455(a), dated Feb. 28, 1997, at 8.) Judge Reavley denied the motion to recuse, writing that the motion "bordered on the frivolous," and that "[t]hat border is crossed by the suggestion of tainted appearances in the designation by Justice Scalia." Judicial Council v. McBryde, Civ. Act. Nos. 4-96-CV-686; 3-96-CV-3043, slip op. at 2 (Mar. 21, 1997).

With the parties in the proceedings briefing for Judge Reavley numerous legal issues, the Special Committee became increasingly concerned over the delay in the Section 372(c) investigation and the expense of these proceedings, and the prospect of further delay and expense that would arise from appeals from any rulings by Judge Reavley. In order to address these concerns and to render moot Judge McBryde's due process objection underlying his attack on the Judicial Council's July 31 order, the Special Committee proposed to Judge Reavley: (1) that the Judicial Council stay its order; (2) that a different independent psychiatrist be appointed by the Special Committee to be present at the Special Committee's evidentiary hearing and to review all materials submitted therein; (3) that at the end of the presentation of evidence in the Section 372(c) hearing he be asked to express his opinion as to whether (a) Judge McBryde did not have a mental problem, (b) Judge McBryde did have a mental problem, or (c) he could not express an opinion either way but believed that a psychiatric examination was warranted based on the evidence the expert had heard. Judge McBryde, through counsel, would then have a full opportunity to cross-examine this expert as to the basis for his professional medical judgment, thus mooting Judge McBryde's due process argument to the procedure the Special Committee

had previously utilized. Judge Reavley accepted this proposal, stating that "[t]he Judicial Council has formed no conclusions about its investigation, and the Council's proposed proceeding reveals that no conclusions will be reached until after careful investigation." Judicial Council v. McBryde, Civ. Act. Nos. 4-96-CV-686; 3-96-CV-3043, slip op. at 1-2 (April 1, 1997). The Special Committee's § 332(d) proceeding and Judge McBryde's complaint for declaratory and injunctive relief are currently stayed in the District Court.[3]

Parallel with, but distinct from, this Section 372(c) investigation, Judge McBryde had commenced a mandamus proceeding against the Judicial Council seeking to overturn an order entered by the Council on October 20, 1995 declining to overturn the reassignment of two cases (United States v. Satz and Torres v. Trinity Industries, Inc.) from Judge McBryde's docket to Chief Judge Buchmeyer's docket. The matter was fully briefed and argued at the end of April 1996 and a decision rendered on July 2, 1997. In re McBryde, 117 F.3d 208 (5th Cir. 1997). This is not the occasion or forum for any expressions concerning that decision. As members of the Special Committee, and as members of the Judicial Council, we are acting here in an administrative, not a judicial, capacity. But that decision contained factual conclusions which affected this Section 372(c) proceeding. Two of the complaints against Judge McBryde (the Whiteaker complaint and the Hunger letter "deemed" a complaint) concerned the sufficiency of the record supporting findings by Judge McBryde that an Assistant United States Attorney ("AUSA") and Postal Inspector Whiteaker lied in Satz about the terms of a sealing order entered by United States District Judge Paul G. Rosenblatt of the District of Arizona. The Special Committee, sensitive to its roles and to its functions, determined not to hear evidence in this proceeding concerning the sufficiency of the record that was before Judge

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[3]As detailed later in this Report, after going through this procedure, Judge McBryde has not exercised what he contended was his due process right to cross-examine the expert's view that a mental examination was warranted.

McBryde in Satz, notwithstanding the Whiteaker and Hunger complaints.

During the period of delay in commencing evidentiary hearings occasioned by the foregoing litigation, the Special Committee and Special Counsel began to learn about more and more instances of allegations of repetitive, abusive and excessive conduct by Judge McBryde beyond the allegations in the five complaints. Pursuant to Section 28 U.S.C. § 372(c)(5) and Rule 9(A) of the Fifth Circuit Rules Governing Complaint of Judicial Misconduct or Disability, the Special Committee decided to broaden its investigation and later notified Judge McBryde of this decision. That entailed extensive investigation by Special Counsel of numerous other persons and proceedings involving Judge McBryde. This broadened investigation was made more difficult at times by, first, the reticence of potential witnesses to communicate with Special Counsel even concerning matters of public record, and, then, the reluctance and unwillingness of some with seemingly substantial allegations even to appear before the Special Committee. Such persons expressed fears of retaliation which the Special Committee now understands and believes are substantial. The basis for this conclusion is discussed later in the Report.

Finally, as the evidentiary hearing approached, the progress was hampered by Judge McBryde's mandamus petition concerning, in connection with this Section 372(c) evidentiary hearing, the issuance of subpoenas duces tecum and ad testificandum (and in what forum, the Special Committee or the Article III courts, disputes related thereto should be resolved). This matter was decided in In re McBryde, 120 F.3d 519 (5th Cir. 1997).

III. THE EVIDENTIARY HEARINGS

The Special Committee conducted evidentiary hearings in New Orleans on August 25 through August 29, 1997 and in Fort Worth on September 29 through October 2, 1997. During the nine days of hearings, the Special Committee heard from fifty-five witnesses. The Special Committee received in evidence hundreds of exhibits, mostly court records and transcripts in matters before Judge McBryde. Among the witnesses presented by Special Counsel were four federal District Court Judges; one

Texas State Court Judge; a former U.S. Attorney for the Northern District of Texas; the Director of Enforcement of the Securities and Exchange Commission; the head of the Public Defender's Office in Fort Worth; Assistant U.S. Attorneys and Federal Public Defenders; the Clerk of the District Court for the Northern District of Texas; and private attorneys who practiced before Judge McBryde. Judge McBryde's witnesses included private and public attorneys who practiced before him; court personnel; employees of the General Services Administration ("GSA"); former members of juries which decided cases over which he presided; and present and former members of his staff.

IV. FINDINGS OF FACT

The Special Committee heard evidence concerning various incidents dating from soon after Judge McBryde was appointed to the bench until very recently. In addition, the Special Committee heard testimony from many witnesses regarding their experiences during trials in Judge McBryde's court, which took place at various times during Judge McBryde's tenure on the bench. The following Findings of Fact are presented in roughly the chronological order in which they occurred and are followed by a separate discussion of Judge McBryde's trial practices, Judge McBryde's witnesses and evidence, and observations and conclusions which the Special Committee has reached.

A. Discrete Incidents and Events

1. Accusing the SEC of Bad Faith for Standing on a Principle (1991)

William McLucas, the Director of Enforcement at the Securities and Exchange Commission, testified regarding a 1991 case presided over by Judge McBryde styled SEC v. Gary R. Van Waeyenberghe. The allegation made by the SEC in the case was that a Mr. Schwartz and two other individuals had defrauded investors in connection with the sale of certain securities. The SEC was seeking injunctive relief as to several provisions of the federal securities law and disgorgement of any ill-gotten gain by the defendants.

In compliance with Judge McBryde's requirement that the parties attend a settlement conference, an SEC staff attorney and Mr. Schwartz met to discuss settlement. Negotiations stalled

because Mr. Schwartz refused to agree to any disposition of the case unless it was sealed. After the parties reported this to Judge McBryde, he issued an order directing that another settlement conference be held at which the SEC be represented in person by someone having full and complete authority to settle the case. This order presented a problem for the SEC because settlements typically required the approval of the Commissioners appointed by the President. The SEC therefore sought relief from Judge McBryde's order requesting that Judge McBryde permit a person with limited settlement authority to attend the settlement conference provided that the SEC make arrangements for an expedited approval process of any proposed settlement reached by the SEC representative and Mr. Schwartz. Judge McBryde responded to the SEC's request by requiring the SEC, prior to the scheduled settlement conference, to review the terms of Mr. Schwartz's settlement proposal and to send a representative with authority to settle on such terms to the settlement conference. In order to comply with Judge McBryde's order, the Commission passed a special resolution authorizing Mr. McLucas to settle the case if he thought it proper to do so.

Mr. McLucas met with the defendants to discuss settlement at the time appointed by Judge McBryde. One defendant, Mr. Schwartz, continued to oppose any settlement unless the disposition was sealed. Mr. Schwartz was willing to agree that such a disposition would be disclosed only if he participated in another public offering. Mr. McLucas, on behalf of the SEC, opposed sealing the disposition, despite Mr. Schwartz's agreement. Mr. McLucas explained that sealing such a disposition is fundamentally at odds with the disclosure premise underlying the federal securities laws and contrary to SEC policy and the SEC's deterrence objectives. Aside from the dispute over sealing, it was apparent that Mr. McLucas and Mr. Schwartz would be able to reach agreement with respect to the other terms of a settlement.

Mr. McLucas' report of the status of negotiations to Judge McBryde prompted the following exchange in which Judge McBryde found that the SEC had acted in bad faith:

"THE COURT: Okay. What I am hearing is he's offering to do whatever needs to be done to make disclosure to people that deal with him, offering to let me order him to do that, to make whatever disclosure the government reasonably could require to people that he's going to deal with.

Now, if the government still insists on a non — What are you calling it, sealing —

MR. McLUCAS: An open record.

THE COURT: — sealing of the record, with that in mind, then it has to be a matter of principle.

MR. McLUCAS: Oh, indeed, it is, Your Honor.

THE COURT: And just a matter of principle.

MR. McLUCAS: Your Honor, it is a matter of principle, and it is a matter of particular principle —

THE COURT: Okay. And I hope the government is not so nonsensical that it is going to stand on simply a matter of principle when the practical things that need to be accomplished can be agreed upon.

MR. McLUCAS: Your Honor, I agree. Your Honor is correct.

I believe we have compromised substantially, and the principle is critical to the enforcement program.

THE COURT: Well, but when you can get a settlement that accomplishes everything that reasonably needs to be accomplished, that ought to be enough in a particular case.

MR. McLUCAS: In a particular case, Your Honor. But I respectfully do not believe —

THE COURT: Well, do you have authority to waive that principle?

MR. McLUCAS: I do, Your Honor.

THE COURT: Okay. We're going to recess and let you all discuss this matter and come back at 1:30. There is no reason in the world for the court to be devoting time to something over where the only hangup is a matter of principle.

So we'll expect the parties to negotiate. You can break for 45 minutes for lunch; but otherwise, I want you to talk

about this. And we will be back in here at 1:30." (Exh. C-34, at 16-17.)

After additional negotiation, Mr. McLucas maintained the position that the SEC would not agree to sealing the disposition. Mr. McLucas reported the SEC's position to Judge McBryde, prompting the following exchange:

"THE COURT: What difference does that make on the issue we are talking about? The issue we are talking about is whether the public is better served by him being forced to make a disclosure by an order of this court, as opposed to there being a lawsuit pending in Fort Worth, Texas with him operating in Michigan.

MR. McLUCAS: Your Honor, in part, it goes to our belief in the credibility of the system, that we can rely on Mr. Schwartz to comply with the court's order and the injunction.

THE COURT: Well, what does that have to do with whether or not anybody would find out about this proceeding in Fort Worth, Texas?

MR. McLUCAS: Because it is fundamentally antithetical to the full-disclosure purposes which are the cornerstone of the federal securities laws for the SEC to agree to seal a court order in a public proceeding that we have brought —

THE COURT: I think the SEC is negotiating in bad faith. I think the SEC is in violation of the local rule that requires good-faith settlement negotiations.

Now, I suggest you all go out there and talk. I'm going to give you to 3:00 o'clock. We're going to talk some more. We are going to get this thing resolved.

MR. McLUCAS: Respectfully, Your Honor, if I might, we have not negotiated in bad faith.

THE COURT: I consider that you are negotiating in bad faith. And I want further negotiations, and I want a report back at 3:00 as to where you are at that time." (Exh. C-34, at 22-23 (emphasis added).)

During the ensuing recess, Mr. McLucas, his local counsel and the SEC General Counsel's Office discussed contingencies to deal with the possibility that Mr. McLucas might be found in

contempt and incarcerated by Judge McBryde for his refusal to agree to the sealing of the final disposition.

When the parties returned to Court and reported that the status of the negotiations remained the same, Judge McBryde, sua sponte, ordered the case sealed. He subsequently unsealed all aspects of the case, except for the final disposition and the transcript of the proceedings at which such order issued. The SEC appealed Judge McBryde's sealing order. The Fifth Circuit reversed Judge McBryde's sealing of the final disposition and transcript and noted that there was no evidence of bad faith on the SEC's part. See SEC v. Van Waeyenberghe, 990 F.2d 845, 849 & n.5 (5th Cir. 1993).

As is reflected infra, findings of "bad faith" and questioning the integrity of lawyers proved to be a pattern in Judge McBryde's court during the ensuing years and, indeed, have continued to the present.

2. Turner I (May to July 1992)

The Special Committee heard evidence concerning an episode in which Judge McBryde called Assistant Federal Public Defender Tim Henry incompetent or, alternatively, insinuated that he was lying, and then went on to state in open court that the entire Federal Public Defender's Office had been less then candid with him.

The events giving rise to this incident were described by Mr. Henry. Mr. Henry represented Patrick Leon Turner in a criminal matter which was set for trial on Monday, May 11, 1992. Mr. Turner decided to change his plea the week before the trial was to begin. On Wednesday May 6, Judge McBryde's chambers informed Mr. Henry that Judge McBryde had set the re-arraignment hearing for the next day, May 7, at 9:00 AM.

Mr. Henry attempted to reach Mr. Turner at home to inform him of the court hearing. Mr. Turner was not at home, but Mr. Henry left word with Mr. Turner's wife to have Mr. Turner call him. Mr. Henry also attempted unsuccessfully to contact Mr. Turner at his place of employment (a radio station) several times throughout the day on May 6. Prior to the scheduled hearing the next morning, Mr. Henry again attempted to reach Mr. Turner at home. Mr. Turner had already left for work and Mrs. Turner informed Mr. Henry that she had

forgotten to tell Mr. Turner that Mr. Henry had called the previous day.

At the May 7 hearing, Mr. Henry explained to Judge McBryde why Mr. Turner was not present — that he had not been able to reach Mr. Turner despite his repeated efforts and that Mr. Turner was therefore unaware of the court date. Mr. Henry explicitly told Judge McBryde that he had not told Mr. Turner's wife of the court date, but only asked her to tell Mr. Turner to call him.

Judge McBryde rescheduled the hearing for the next day and ordered Mr. Turner arrested. At the May 8 hearing, Mr. Henry again explained to Judge McBryde that Mr. Turner's failure to appear at the May 7 hearing was unintentional as he was unaware of the court date. Mr. Henry reiterated that he had not told Mr. Turner's wife of the court date. Judge McBryde ordered Mr. Turner remanded to custody pending sentencing.

At the July 17, 1992 sentencing hearing, the issue of Mr. Turner's failure to appear on May 7 again surfaced regarding whether Mr. Turner would receive an upward enhancement of his sentence for obstruction of justice. This depended on whether his failure to appear on May 7 was intentional. Mr. Henry, as he had on May 7 and May 8, told Judge McBryde that Mr. Turner's failure to appear was unintentional as he had no knowledge of the court date. Mr. Henry reiterated that he had never told Mrs. Turner of the court date. In addition, Mr. Henry put Mrs. Turner on the witness stand, and she corroborated under oath that Mr. Henry had only asked her to tell Mr. Turner to call him, but had not mentioned a court date, and that she had forgotten to relay the message to him.

Despite being told on three separate occasions by Mr. Henry that he had not told Mrs. Turner of the court date and despite hearing corroborating testimony to that effect from Mrs. Turner, Judge McBryde's response revealed his conclusion that he was being deceived:

> "THE COURT: Okay. Mr. Henry, I simply don't believe you. I believe you told that lady that, if she talked to her — you told her that this man was scheduled to be sentenced. And I'm giving you the benefit of the doubt. I am assuming that you have forgotten what you told her.

You are not totally incompetent, and you would have to be totally incompetent not to tell that man's wife that his sentencing was scheduled the next day.

Okay. I find that the defendant did obstruct justice by not appearing for the hearing that was scheduled in this case." (Exh. C-21, at 40.)

In addition to accusing Mr. Henry in open court of lying,[4] Judge McBryde went on to accuse all the members of the Federal Public Defender's Office of lacking integrity, stating:

"THE COURT: I have perceived on more than one occasion recently that members of the Federal Public Defender's Office are less than candid with the court, and I am not going to tolerate that. And I am conveying the message to you, and I hope that you help convey the message to the others." (Id. at 48.)

Mr. Henry's testimony before the Special Committee evidences the demoralizing impact such treatment understandably has on officers of the court whose careers are jeopardized when their integrity is called into question by a federal judge. Judge McBryde testified that he thought his public statement accusing an entire office of dedicated professionals of being dishonest was the best way to send a message to the office. Judge McBryde presented no persuasive evidence to support his charge of office-wide dishonesty.

3.. Saulsberry Sanction (July to November 1992)

The Special Committee received evidence of Judge McBryde's sanctioning of an in-house counsel, Belinda Saulsberry, in a case styled Sims v. ANR Freight System and Robert Hembling. This incident is most disturbing to the

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[4]Judge McBryde confirmed during the hearings that he believed Mr. Henry had lied, not that he was forgetful or incompetent. When asked what possible motive Henry would have to lie to him, Judge McBryde suggested "to protect his client." (McBryde, TR: 1095.) The Special Committee does not find it plausible that Mr. Henry, a public defender who must appear repeatedly before Judge McBryde and who is assigned impoverished clients at random, would lie to Judge McBryde under these circumstances. If Mr. Henry lied at that time, he would have perjured himself before this Committee. We believe that Mr. Henry told the Special Committee the truth in his testimony.

Special Committee and, in its view, reflects a gross abuse of power and a complete lack of empathy. There is no rational justification for Judge McBryde's behavior in this matter.[5]

Ms. Sims and her ten-year old daughter, Shaleen Day, sued ANR Freight System and one of its employees, Robert Hembling, alleging sexual harassment, retaliation, assault and battery, negligence, gross negligence and intentional infliction of emotional distress. Ms. Saulsberry represented both ANR and Mr. Hembling. The complaint in this matter alleged, inter alia, that Mr. Hembling had waited (on two separate occasions) for Ms. Sims to leave home and then placed a telephone call to Shaleen (the ten-year-old girl) in which he told her that he would kill her mother and rape her if her mother did not drop the charge of discrimination and sexual harassment against him at work.

Although Judge McBryde had issued his standard pretrial order in the case which required the parties, including principals, to attend settlement conferences, Ms. Saulsberry did not bring Mr. Hembling to the first settlement conference. As she explained to Judge McBryde at a subsequent hearing, she understandably believed that Mr. Hembling's presence would be counter-productive to the goal of reaching settlement because of the nature of the allegations in the case. In addition, Mr. Hembling had no assets and had given Ms. Saulsberry full authority to settle the case.

After the settlement conference occurred, the parties filed a Joint Status Report with Judge McBryde which provided, in part, a summary of the allegations being made by the plaintiffs. One of the allegations recounted in that report that was not specifically mentioned in the complaint was that Mr. Hembling

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[5] Betty Springer, Ms. Saulsberry's local counsel, was subpoenaed to testify on Judge McBryde's behalf. The purpose of her testimony escapes the Special Committee, as she offered no opinion or evidence regarding Judge McBryde's treatment of Ms. Saulsberry. In fact, she signed a brief, along with Ms. Saulsberry, endorsing the decision of Ms. Saulsberry that gave rise to the humiliating sanction imposed on Ms. Saulsberry by Judge McBryde.

had terrorized the 10-year-old Shaleen Day by popping out his glass eye and putting it in his mouth in front of her.

At a hearing after the filing of the Joint Status Report, Judge McBryde interrogated Ms. Saulsberry as to why Mr. Hembling was not present at the settlement conference. The following excerpt depicts the deplorable manner in which Judge McBryde treated Ms. Saulsberry:

"THE COURT: Okay. Why don't you tell me why Mr. Hembling was not at the settlement conference that was held at an earlier date?

MS. SAULSBERRY: Your Honor, Mr. Hembling has no money, and he indicated to me that he had no money and had no assets from which to contribute towards settlement negotiation. He authorized me, on behalf of him and the company, to settle this case.

And we believed that, based upon the fact that he did not have any money — and we had been at a deposition of the plaintiffs, and Mr. Hembling was not asked to attend. And the reason I didn't ask him to attend the deposition is because we have a minor plaintiff, and I wanted to give her full consideration. The allegations —

THE COURT: No. I am not asking about depositions. I am asking about why didn't he attend the settlement conference?

MS. SAULSBERRY: That was —

THE COURT: Let me find the report on that settlement conference.

Apparently it was one that was held —

MS. SAULSBERRY: May 1st.

THE COURT: Was it when?

MS. SAULSBERRY: May 1st, Your Honor.

THE COURT: Okay. And we have a report on that that was filed as part of the joint status report on May 5. I just want to know why he didn't attend that.

Did you tell him he didn't have to be there?

MS. SAULSBERRY: No, I didn't tell him he didn't have to be there. I just told him that we were going to talk with the plaintiffs and we were going to see what their

settlement offer was and that we would represent him at that time.

THE COURT: Did you seek any relief from my order that ordered him to be there?

MS. SAULSBERRY: No, sir.

THE COURT: By what line of reasoning did you conclude that you had the right to tell him to violate my order?

MS. SAULSBERRY: Your Honor, I did not think I was violating your order. I was trying to comply with it as best that we could and felt that Mr. Hembling's presence would not facilitate the negotiations. It is not an intentional noncompliance.

THE COURT: Well, what did you think I meant in my order when I said that each party would appear in person at the settlement conference?

Let me find the exact orders.

Said parties and their counsel shall participate in person and not by telephone or other remote means.

What did you think that meant?

MS. SAULSBERRY: Your Honor, I thought that we were complying with the spirit of the order in trying to —

THE COURT: What did you think that meant?

MS. SAULSBERRY: It meant that everybody should be present, Your Honor. At the same time that I read it, though, I —

THE COURT: Did you have a hard time understanding it?

MS. SAULSBERRY: No, sir.

THE COURT: I recently had this problem, and the lawyers ended up taking a reading comprehension course.

MS. SAULSBERRY: Yes, sir.

THE COURT: And I think we are going to do that again.

MS. SAULSBERRY: Yes, sir.

THE COURT: So you are ordered to attend 15 hours of a reading comprehension course, and I want — well, we'll enter a formal order on that.

MS. SAULSBERRY: Yes, sir.

THE COURT: Because we have to understand what the orders of the court say.

Do you understand that?

MS. SAULSBERRY: I understand." (Exh. C-89, at 8-10.)

As the above excerpt reflects, Judge McBryde sanctioned Ms. Saulsberry by requiring her to attend fifteen hours of a reading comprehension course and to submit an affidavit swearing to her compliance. Locating a course that would meet the requirements of this order proved quite difficult and Ms. Saulsberry eventually had to file an affidavit seeking additional time to comply with Judge McBryde's order because she was unable to identify an appropriate program. Ms. Saulsberry eventually located a course meeting Judge McBryde's requirements. She took the course and then submitted an affidavit describing the course and stating that she attended it three hours a week over a five-week period.

Judge McBryde was not satisfied. On November 16, 1992, he entered an order requiring Ms. Saulsberry to file a supplemental affidavit listing "each day that she was in personal attendance at a reading comprehension course in compliance with [the] court's order; the place where she was in attendance on each date; the course title of each course; how long she was in attendance on each day; and the name of a person who can verify her attendance for each day listed." (Exh. C-94.) To comply with Judge McBryde's order, Ms. Saulsberry was forced to submit an excruciatingly detailed affidavit. The only rationale Judge McBryde could offer for requiring Ms. Saulsberry to submit to such a humiliating procedure was that he thought her initial affidavit was "not a direct statement that she attended the course." (McBryde, TR: 2135.)

No more need be said with regard to this incident.

4. Peter Fleury Scheduling Conflict (July 1992)

One incident, itself fairly trivial but along with other incidents illustrative of a pattern of conduct, involved a hearing before Judge McBryde on July 17, 1992. There, Assistant Federal Public Defender Peter Fleury was scheduled to appear at a complicated sentencing hearing before Judge McBryde at the same time he was scheduled to appear at a routine arraign-

ment before Judge Terry Means. Mr. Fleury's secretary called Judge McBryde's chambers a few days before the hearings to arrange for Mr. Fleury's sentencing hearing to be taken at the end of the docket, so that he could first attend to the routine arraignment before Judge Means. While Mr. Fleury was under the impression that such an arrangement had been made, Judge McBryde's court coordinator, Barbara Garner, informed the Special Committee that no arrangement had been made and that she told Mr. Fleury's secretary that Judge McBryde takes cases in whatever order he pleases so that no guarantee could be made.

Believing the arrangement had been made, Mr. Fleury proceeded to Judge Means' courtroom on the morning of July 17. Meanwhile in Judge McBryde's courtroom, Judge McBryde called Mr. Fleury's sentencing matter as the first case. Since Mr. Fleury was not present, Judge McBryde called upon Assistant Public Defender Tim Henry to represent Mr. Fleury's client. Mr. Henry explained to the Special Committee that this was a complicated sentencing matter with which he was not familiar and accordingly he did not feel comfortable representing Mr. Fleury's client in the matter. After consulting with the client, Mr. Henry informed Judge McBryde that the client wanted to wait for Mr. Fleury. Notwithstanding the client's wishes, Judge McBryde decided to commence the proceeding, stating that "hopefully Mr. Fleury will be here before we get to the parts that would require any discretion." (Exhibit C-13, at 4.) Mr. Henry had also explained to Judge McBryde that he understood that Mr. Fleury was currently appearing before Judge Means and that the proceeding there would be quite short. Rather than calling another matter on the docket when it became apparent that Mr. Fleury was engaged before Judge Means, Judge McBryde first decided to proceed with the Holloway case in Mr. Fleury's absence and then elected to make all the parties stand at the podium while he awaited reports as to Mr. Fleury's status from Assistant Public Defender Amy Seidman, who had gone to Judge Means' courtroom.

After a short period of time, when Ms. Seidman had not returned, Judge McBryde asked AUSA Fred Schattman to check on her. In AUSA Schattman's absence, Ms. Seidman returned

to Judge McBryde's courtroom and reported that Mr. Fleury was engaged in proceedings before Judge Means. Judge McBryde then asked her to go back to Judge Means' courtroom to monitor what was going on with Mr. Fleury's proceedings. Mr. Henry described the atmosphere in Judge McBryde's courtroom while awaiting the status reports as to Mr. Fleury's proceedings before Judge Means as extremely tense. After some period of time, Judge McBryde indicated he was going to take up another matter, but that it was "inexcusable on the part of the Federal Public Defender to conduct themselves this way." (Exhibit C-13, at 6-7.) AUSA Schattman then arrived and told Judge McBryde that "Judge Means interrupted his proceedings with Mr. Fleury to allow Mr. Fleury to come up here." (Exhibit C-13, at 7.)

During this same time period, in Judge Means' courtroom, AUSA Schattman and Ms. Seidman, one after the other, had approached Mr. Fleury to tell him that Judge McBryde had called the Holloway case. Judge Means observed both of them approach Mr. Fleury. After the second interruption, Mr. Fleury explained to Judge Means that he was needed in Judge McBryde's courtroom. Judge Means interrupted his proceeding to allow Mr. Fleury to go to Judge McBryde's courtroom, commenting that he did not want to "get [Mr. Fleury] in trouble with Judge McBryde." (Exhibit C-14, at 4.)[6] Mr. Fleury arrived in Judge McBryde's courtroom shortly thereafter, and Judge McBryde told him that his behavior was "inexcuseable." (Exhibit C-14, at 7.)

Ms. Garner testified that Judge McBryde is generally accommodating to the schedules of lawyers.[7] While we have no

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[6] Mr. Fleury explained his dilemma to the Committee: "I didn't want to aggravate Judge Means and let him think that I had less deference to him than any other judge. At the same time, I didn't want Mr. Holloway to be underrepresented in an important sentencing hearing, so I explained to Judge Means that Judge McBryde wants [sic] me upstairs." (Fleury, TR: 238.)

[7] According to Ms. Garner: "If [lawyers] call me and say they have a conflict, many times I've gone to Judge McBryde and I will say, 'So-and-so has a conflict. Can we put him at the first or put him at the end,' depending on his conflict at the time, and he has never told me anything but, yes, we

reason to dispute Ms. Garner's testimony in this regard, it is apparent that Judge McBryde was not accommodating to Mr. Fleury in this instance.[8] In addition, as is discussed in more detail infra, Ms. Garner's testament to Judge McBryde's flexibility in scheduling matters is not consistent with Judge McBryde's conduct in other matters such as Judge Lowe incident (Part III.A.13) or the Burgos case (Part III.A.17). Together, these incidents raise serious questions about Judge McBryde's willingness to accommodate scheduling conflicts and difficulties.

5. Fourth Floor Order (October 1992 to February 1994)

The Special Committee heard evidence of Judge McBryde's sanctioning all the attorneys in the Federal Public Defender's Office because one attorney, Assistant Tim Henry, was not reachable for approximately forty-five minutes when he was told the jury had recessed for lunch.

On October 23, 1992, Mr. Henry was representing a criminal defendant in a trial before Judge McBryde. At the conclusion of the evidence, the jury retired to conduct its deliberations. Judge McBryde had instructed the attorneys to be close enough to return in five minutes should he receive a note from the jury. At approximately 11:55 AM, Mr. Henry telephoned Judge McBryde's chambers to inquire if the jury was intending to deliberate through lunch. Judge McBryde's clerk informed Mr. Henry that the jury had decided to take lunch and would be gone for approximately one hour. Based upon that information, Mr. Henry himself went to lunch, but he did not leave a number with his office where he could be reached. Contrary to what Mr. Henry had been told, the jury decided not to take lunch, continued its deliberations, and reached a verdict. Because Mr. Henry could not be reached, the Court and the other parties had to wait approximately forty-five minutes until

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will do this or that." (Garner, TR: 1944.)

[8] Perhaps we will never know why Judge McBryde called Mr. Fleury's case first that morning. According to Ms. Garner, Judge McBryde ordinarily would have taken sentencing matters last.

another assistant public defender could be found to fill in for Mr. Henry and to receive the jury's verdict.

When Mr. Henry returned from lunch and learned that the jury had reached a verdict, he rushed to Judge McBryde's courtroom. In open court, Judge McBryde called Mr. Henry and Mr. Paul Stickney (the other Assistant Public Defender whom Judge McBryde had found to take the verdict) to the bar. Judge McBryde questioned Mr. Henry as to why he had been unreachable. Mr. Henry explained that he had gone to lunch after being told by the judge's clerk that the jury would be taking lunch for approximately one hour. Mr. Henry also apologized to the Court for failing to leave a number where he could be reached.

Notwithstanding the explanation, Judge McBryde ordered that not only Mr. Henry but also every Public Defender in the office should remain on the fourth floor of the courthouse throughout jury deliberations in any case before him, including during a lunch break or recess, and he ordered Mr. Henry to so inform his colleagues in the office by written memorandum with a copy to the Court. In Judge McBryde's own words:

> "THE COURT: I am not going to take any other action at this time other than to instruct you to get a memo to every member of the Federal Public Defender's Office that at no time while the jury is deliberating in my court—from beginning to end; during lunch hour, recesses or anything else—is that attorney to leave the fourth floor of this courthouse. And I want a copy of it.
>
> MR. HENRY: Thank you, Your Honor.
>
> THE COURT: And that will be the general rule. Don't ask for any exceptions. And no other member of the Federal Public Defender's Office is to ask for an exception. That will be the rule. From the time the jury leaves this courtroom to start deliberating until the jury returns a verdict the attorney will be on the fourth floor of this courthouse." (Exh. C-22, at 5.)

Judge McBryde's clear directive that no attorney was even to request an exception to the Fourth Floor Order had its intended deterrent effect until February of 1994, some sixteen months later. At that time, Mr. Stickney had to try two criminal

cases on the same day before Judge McBryde. In order to prepare witnesses in the second case, Mr. Stickney asked Judge McBryde to lift the Fourth Floor Order in the first case.[9] Judge McBryde granted Mr. Stickney's request by lifting the Fourth Floor Order completely, stating he was optimistic that members of the Public Defender's Office would be responsive to the necessity of being readily available at all times for appearance in the courtroom or conference with the court during jury deliberations on a basis that will not cause any delay in the proceedings. Like the Fourth Floor Order itself, the rescission order is odd in that it seems to suggest that all the attorneys in the Federal Public Defender's Office had at some point been unresponsive to the necessity of being readily available during jury deliberations. That is simply not the case. The only Public Defender who could even arguably be said to have been unresponsive to the "necessity" identified by Judge McBryde was Mr. Henry, who had simply gone to lunch when he had been told that the jury was also going to lunch.

Judge McBryde's testimony concerning the Fourth Floor Order is as troubling as the order itself. He testified that he intended to punish Mr. Henry through the imposition of the

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[9]Judge McBryde submitted certain information relating to the lifting of the Fourth Floor Order at the time of the York and Coats cases. It appears that both Mr. Stickney and Judge McBryde incorrectly recalled that the motion to lift the order came when the jury was deliberating in York, when in fact it occurred earlier in the day, before those deliberations started. The conclusion to be drawn remains the same, viz., Stickney made the motion to lift the order only when he faced a second trial before Judge McBryde which overlapped jury deliberations in the first trial before Judge McBryde. In those circumstances, Stickney could not remain on the Fourth Floor and also meet with witnesses, including the defendant, and otherwise be prepared for the second trial. Judge McBryde's grant of Mr. Stickney's request in the York case also indicates that Judge McBryde had been contemplating the Fourth Floor Order, which he had entered some sixteen months earlier. (Exhibit FFO 27 ("Well, I've been thinking about changing that order and limiting it to only one member of the staff, and so I will do that as of now.") This runs counter to Judge McBryde's recollection in his testimony before the Committee in which he stated: "[The Fourth Floor O]rder probably went out of my mind because I'm not sure I had any consciousness of it until Mr. Stickney raised the question." (McBryde, TR: 2068-2069.)

order on his colleagues who had done nothing even arguably warranting a sanction. Judge McBryde rationalized his action against Mr. Henry's colleagues by telling the Special Committee that he viewed the Fourth Floor Order as a "favor" to the attorneys in the Public Defender's Office in that it forced them to do what they should be doing on their own. (McBryde, TR: 2164.) He also stated that he thought the order was fair under the circumstances.

The Fourth Floor Order had its intended punitive effect on Mr. Henry. He was understandably humiliated and embarrassed by these events because his actions resulted in hardship for his colleagues. Mr. Henry told the Committee:

> "I felt like a little kid, first of all, like I was being punished. I did stay on the fourth floor, but I also felt that I had caused my colleagues to be placed under this order, as well, so I felt pretty small, I think, by having to put them through this as well, but I accepted my punishment. I religiously stayed on the floor every other time that I had a trial." (Henry, TR: 303.)[10]

Indeed, as a consequence of this and other experiences with Judge McBryde, Henry left the Public Defender's Office in Fort Worth.[11]

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[10] Ira Kirkendoll, the Federal Public Defender, and his First Assistant, Paul Stickney, characterized the effect of the Fourth Floor Order on the attorneys as humiliating and making them feel like children.

[11] The testimony of Randy Harris, a court security officer and witness for Judge McBryde, seemed to be intended to suggest that Public Defenders went to lunch and did not remain on the Fourth Floor during lunch breaks and recesses during the sixteen-month period in which the Fourth Floor Order was in effect. As an initial matter, Mr. Harris did not actually become the full-time court security officer for Judge McBryde until March 1994 — a point after the Fourth Floor Order had been lifted. Furthermore, while Mr. Harris indicated that he had occasionally worked as a security officer for Judge McBryde prior to this point, he was unable to name a single Public Defender who actually left the fourth floor in violation of Judge McBryde's order.

Mr. Harris' testimony resulted in the post-hearing filing of affidavits by three Assistant Public Defenders who had tried cases before Judge McBryde during the relevant time period. In these affidavits, they affirmed

6. Anderson (November 1992 to August 1994)

The Special Committee took notice at the hearings of two Fifth Circuit decisions arising from United States v. Bobby J. Anderson: No. 92-1979, slip op. (5th Cir. Jan. 27, 1994) and No. 94-10817, 70 F.3d 353 (5th Cir. 1995).

In January 1992, Bobby J. Anderson was indicted on four drug-related counts. In March 1992, Anderson's attorney and the government prosecutor, AUSA Frederick Schattman, executed a Memorandum of Understanding, which provided that Anderson would provide information to the government and that, after evaluating this information, the government would "make some nature of a plea offer." The Memorandum also provided that if Anderson rejected the government's offer "no statements made by [Anderson] in the interview will be used against him in any criminal trial" except to impeach inconsistent testimony.

On May 11, 1992, the government issued superseding information charging Anderson with money laundering. On the same day, Anderson pled guilty to the charge. In the plea agreement, the government promised to dismiss the January indictment if Anderson complied with the terms of the plea (which required him to cooperate with and testify for the government). The District Court accepted Anderson's guilty plea and eventually set a sentencing hearing for October 30, 1992.

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their belief (supported by the order itself) that they were to remain on the fourth floor, without exceptions, throughout the course of jury deliberations, and that they did so, including during any recess or lunches that may have been taken. They had no specific recollection as to whether or when lunches or recesses were taken in specific cases. Counsel for Judge McBryde has submitted material indicating that it is unlikely that the jury recessed or broke for lunch in certain of the relevant cases. With all due respect to the effort expended by counsel for Judge McBryde in this regard, the Special Committee notes that whether, in fact, juries broke for lunch or took recesses in particular cases is of secondary importance. Judge McBryde could not have known when he issued the order that juries in cases before him involving Public Defenders would not take lunch breaks. Also, this does not change the demoralizing effect the order had on the Public Defender's Office.

At the October 30 hearing, Judge McBryde expressed his concern that the guidelines range for the money laundering conviction would be substantially lower than the range if the defendant had been convicted of the charges contained in the indictment. He announced that he was not accepting the plea agreement and offered to let Anderson withdraw his guilty plea to the money laundering charge.[12]

Following the hearing, AUSA Schattman sent a letter to Anderson's counsel stating that if Anderson persisted in his guilty plea on the money laundering charge, the government would move to dismiss the other counts of the indictment. Anderson decided not to withdraw his plea.

On November 12, 1992, AUSA Schattman filed a motion to dismiss the January indictment, explaining that Anderson's cooperation with government investigators and testimony "was of significant benefit . . . and critical importance" in four criminal prosecutions. No. 92-1979, slip op. at 7 (quoting motion). In particular, Anderson had been a key witness in the trial of Willie Hugh Morris, a major drug dealer in the Fort Worth area. Dismissal of the indictment was also important for the credibility of the government in future negotiations with potential cooperating witnesses. As explained by former AUSA Michael Sanders, who assisted AUSA Schattman on the Anderson case:

> "Because of Mr. Anderson's cooperation, we had entered into an agreement with him. He had lived up to this end of the agreement. Had the government not lived up to their end of the agreement, then we would have lost credibility

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[12] Probation officer Candice Story worked on the Anderson matter with Judge McBryde. She testified that she told Judge McBryde that there was a "red flag" relating to the plea agreement, in that under the agreement Anderson was not pleading to any of the counts in the January 1992 indictment, but was instead pleading to a money laundering count that arose several years prior to the conduct identified in that indictment. (Story, TR: 1252-53.) When asked by Judge McBryde why she thought this had occurred, Story noted that the defendant was the nephew of a DEA agent in the area. Story did not know whether in fact this relationship had had anything to do with the plea agreement, however.

> with future people that wanted to assist the government in subsequent investigations." (M. Sanders, TR: 900.)

The ultimate decision to file the motion to dismiss the January indictment was made by Marvin Collins, the U.S. Attorney for the Northern District of Texas.

On November 13, 1992, Judge McBryde convened a hearing and denied the motion. In the course of this hearing, he repeatedly attacked the integrity of AUSA Schattman and suggested that the decision to seek dismissal of the January indictment was motivated by the "special relationship" between Schattman and A.C. Anderson, a DEA agent who was the uncle of the accused. The Fifth Circuit summarized the hearing as follows:

> "At the end of the November 13th hearing and at a subsequent hearing, the district court expressed extreme displeasure with Schattman indicating that the government had attempted to usurp the district court's prerogative to reject the plea agreement. The district court suggested the possibility that Anderson had received lenient treatment because his uncle works with the Drug Enforcement Agency task force and Schattman." 70 F.3d at 354.

In a subsequent hearing the same day, Judge McBryde ordered the U.S. Attorney, Marvin Collins, to appear personally. He ordered Collins to appoint a new prosecutor to try the original indictment.

Judge McBryde never asked Collins whether he was consulted in the decision to seek dismissal of the indictment. If he had so inquired, he would have been told that Collins himself, not Schattman, made the ultimate decision to seek dismissal of the indictment and that the relationship between Schattman or Anderson and Anderson's uncle played absolutely no role in this decision.[13]

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[13] Gartner was the Executive Assistant to Collins at the time and was "consulted by Mr. Collins on most of the key decisions, most of the important decisions, that went on in the office" — including the decision to seek dismissal of the January indictment of Anderson. (Gartner, TR: 1299-1300.)

At this point, the government sought an order staying the trial and a writ of mandamus requiring Judge McBryde to dismiss the January 1992 indictment. The Fifth Circuit granted the motion to stay and, in January 1994, ordered that a writ would issue unless the indictment was dismissed within thirty days. In this opinion, the Fifth Circuit rejected evidence of alleged "bad faith" on the part of the government. In particular, the court rejected Judge McBryde's contention that the October 30 letter from Schattman to Anderson's counsel constituted a "secret deal" contrary to the public interest. Instead, that court found that the assurance contained in the letter that the government would move to dismiss the indictment was based upon "legitimate considerations," including Anderson's past cooperation and his willingness to testify in future cases. No. 92-1979, slip op. at 8. The Court also found that the "special relationship" cited by Judge McBryde between AUSA Schattman and Anderson's uncle was not implicated in the government's decision to dismiss the indictment and did not support any conclusion that this decision was contrary to the public interest. Id. at 9-10.

In response to the Fifth Circuit decision, Judge McBryde dismissed the January 1992 indictment of Anderson. The sentencing process then resumed before Judge McBryde. In the course of this process, Judge McBryde took the position that any information provided by Anderson pursuant to the March 1992 Memorandum of Understanding prior to the execution of the formal plea agreement in May 1992 could be taken into account for the purpose of an upward departure in sentencing. The government and Anderson took the position that the March 1992 Memorandum of Understanding and the plea agreement prevented this information from being taken into account.

Judge McBryde ultimately decided to take the information into account, holding that there was "absolutely no legal basis" for the government's contention that the debriefing information Anderson provided pursuant to the Memorandum of Understanding could not be used against him at sentencing. Judge McBryde also took the occasion to attack AUSA Schattman's integrity again, expressing his belief that AUSA Schattman had deliberately misled the court concerning the nature of the

government's agreement with Anderson and his "relationship" with Anderson's uncle. 70 F.3d at 355-56.

Anderson appealed his sentence and the Fifth Circuit vacated the sentence and remanded the case to another district judge. Id. at 357.

As noted, the Fifth Circuit rejected Judge McBryde's allegations of bad faith against AUSA Schattman — in particular, his suggestion that Schattman was improperly motivated by the fact that Anderson's uncle was a DEA agent.

The Special Committee considers this case relevant because it is an example of a disturbing pattern on Judge McBryde's part of making devastating allegations of deceit and bad faith against attorneys who disagree with him. In Anderson, the U.S. Attorney's Office cited a number of reasons for seeking the dismissal of the indictment. Judge McBryde did not just disagree with these reasons; instead, he went on to conclude that they were a subterfuge and that the decision was made in bad faith. Similarities with the Van Waeyenberghe case are clear. As explained below, in the years following Anderson, additional examples arose.

7. Dawson (March 1993)

In Dawson v. United States, 4:92-CV-144-A, a federal prisoner (Johnnie Dawson) brought a claim under the Federal Tort Claims Act ("FTCA") based upon injuries he sustained when he ran into a pole while chasing a fly ball during a prison softball game.

AUSAs R. Wayne Hughes and Civil Division chief Claude R. Brown met with Dawson on two occasions (August 10, 1992 and February 22, 1993) to discuss settlement. A report was filed describing these meetings and stating that Dawson made a settlement offer, but the government declined to make a counter-offer. Hughes and Brown ultimately identified a number of reasons for refusing to make a monetary settlement offer to Dawson, including: (1) that the government had a summary judgment motion pending, (2) that they believed that the suit lacked merit and was frivolous; and (3) that they wanted to discourage other suits by prisoners (a "very litigious group"). 68 F.3d at 890-91.

On March 4, 1993, a pretrial conference was held. Dawson did not show up for this conference, but Judge McBryde took the opportunity to question Hughes about the settlement efforts and about the pending summary judgment motion. In this motion, the government had relied, in part, upon a Texas statute, Tex. Civ. Practice & Rem. Code § 75.001 et seq., which provides that a landowner who makes his property available for recreational use is liable only if he has been grossly negligent or acted with malicious intent or bad faith. Judge McBryde ultimately rejected this argument and concluded that the prison's duty of care was established by a federal statute, 18 U.S.C. § 4042.

Judge McBryde also asked Hughes a number of questions about the merits of Dawson's claims. The Judge went on to state that:

> "If this was a suit involving a private party, as opposed to the government, it would be a very serious liability suit. And I guess the only reason the government doesn't consider it to be a serious liability suit is it doesn't take things seriously a lot of the times when it should. . . . I don't think you have acted in good faith. I think you have acted in bad faith." (Exh. C-108, at 17 (emphasis supplied).).

Judge McBryde then set a hearing for March 11, 1993 for (1) Dawson to show cause why he should not be sanctioned for failing to attend the March 3 conference; and (2) the government and its counsel to show cause why they should not be held in contempt for failure to comply with Local Rule 9.1(a) concerning the duty to make a good-faith effort at settlement.

A hearing was held on March 11. Dawson again failed to show up for the scheduled hearing. Notwithstanding the fact that Dawson had evidenced his lack of interest in his complaint by not having shown up for two hearings,[14] Judge McBryde went on to hold an extensive hearing, the transcript of which is

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[14] Following this hearing, Judge McBryde issued an order to Dawson to file an affidavit explaining why he had failed to show up for the pretrial conference or the show cause hearing. Dawson failed to make any such filing, and his case was dismissed with prejudice on March 23, 1993.

144 pages long and which is estimated to have lasted several hours. In the course of the hearing, Judge McBryde questioned AUSAs Hughes and Brown in detail about such subjects as the merits of Dawson's claim, their reasons for not making a monetary settlement offer to Dawson, and the basis for the government's summary judgment motion.

At the end of the hearing, Judge McBryde concluded that the explanations of Hughes and Brown for failing to make a settlement offer to Mr. Dawson were "unworthy of belief" and "frivolous and in bad faith." (Exh. C-99, at 138.) According to Judge McBryde, the government had "stipulated enough facts [that] a fact finder could find the government liable from those stipulated facts." (Id. at 136.) Judge McBryde also stated that, if the government had "used an ounce of logic," it would have known that the Texas recreational statute had "nothing to do with this lawsuit." (Id., at 126.) The government's motion for summary judgment based on this statute was "an affront to the Court." (Id. at 129.)

Finally, Judge McBryde issued a broad attack on the integrity of the entire Civil Division of the U.S. Attorney's Office in Fort Worth:

> "I have not enjoyed doing this, but, unfortunately, in the Civil Section of the U.S. Attorney's office here in Fort Worth there are more times than one where I had problems . . . . I just have the feeling that the Civil Section of the U.S. Attorney's office here in Fort Worth is not always candid with the Court and that the material I receive from that office has not been thought out and prepared. And it's very disappointing to me that I have to do the sort of things that I am doing today in this case.
>
> But I want it known to everyone that comes in my court that I take seriously the local rules of my court that includes Local Rule 9.1 and my orders that deal with settlement conferences, and I don't think the U.S. Attorney's office takes that seriously, and they certainly haven't taken it seriously in this case." (Exh. C-99, at 140-41.)

The preceding quotations are only a few excerpts from the dozens of pages of invective included in the March 11 transcript. Putting aside whether these allegations were correct (the

Fifth Circuit ultimately decided that they had no basis), the sarcastic and abusive language used by Judge McBryde is itself a cause for concern. There was simply no good reason to belittle and attack Brown and Hughes in such a repetitive and relentless manner.

Sixteen months after this hearing, Judge McBryde issued a thirty-three-page opinion castigating and imposing sanctions upon Hughes and Brown. The Judge noted that the sanctions were "of significantly less magnitude than would have been imposed" if the U.S. Attorney's Office had not shown improvement in its willingness to settle cases in the time since March 1993. (Exh. C-111, at 30.) Among other things, Judge McBryde suggested that Hughes and Brown had misled Dawson in an attempt to take advantage of his status as a pro se litigant.[15] The court ordered that Hughes and Brown be reprimanded and that Hughes attend fifteen hours of courses on the ethical responsibilities of attorneys. The court also ordered that copies of the opinion be delivered to the U.S. Attorney for the Northern District of Texas and to the staff of the Attorney General. The government moved to alter or amend the sanctions order. Judge McBryde denied this motion in a thirty-seven-page opinion which repeated, and embellished upon, many of the previous attacks on Hughes and Brown.

The government then appealed the finding of bad faith and the imposition of sanctions on Hughes and Brown. The Fifth Circuit reversed Judge McBryde's findings of bad faith and imposition of sanctions as "clearly erroneous" explaining, inter alia, that:

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[15] Judge McBryde's opinion hypothesized that:

> "Undoubtedly, counsel for defendant devoted significant time at both settlement conferences to falsely describing to Dawson the merit of his claim and the applicable law. They certainly have been less than candid in their presentations to the court on those subjects; and, there is no reason to think that they did not make statements to Dawson that were at least equally lacking in candor." (Id. at 27.)

- "We need not decide whether § 4042 or the Texas statute govern in this FTCA action; suffice it to say that this is a question of law on which reasonable minds could differ. And, needless to say, a district court's disagreement with the merits of a position asserted in good faith by counsel cannot serve as the basis for sanctions." 68 F.3d at 896.
- "It goes without saying, that, as noted, [Hughes and Brown] appear to have had numerous legitimate reasons for not offering the taxpayers' money to Dawson." Id. at 899.
- "In sum, Hughes and Brown should not have been sanctioned. Likewise, findings that they acted improperly, or unprofessionally, in the manner in which they handled this action are clearly erroneous. To that end, we find most inappropriate the district court's conclusion that they, in effect, tried to manipulate, or take advantage of, Dawson at the settlement conferences or in preparing the pretrial order. No more need be said; this most regrettable chapter is closed." Id.

Judge McBryde's comments and conduct during the Dawson matter had a devastating effect on the two U.S. Attorneys involved. Claude Brown retired early from the Office as a result, in part, of his experience in Dawson; Wayne Hughes has, in the view of his supervisor, become more reserved and indecisive, reducing his effectiveness as a litigator.[16] Both "worried about their careers, their abilities to remain as AUSAs." (Gartner, TR: 1335-36.) The case had serious consequences for the entire U.S. Attorney's Office as well. AUSA Marc Barta testified that Judge McBryde's broad attack on the Civil Division of the U.S. Attorney's Office "had a directly detrimental effect on their morale. They had their ability and/or integrity impugned by a federal judge in a public

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[16] Indeed, Brown has repeatedly noted his fear that, now that he had retired, Judge McBryde will appoint him in a criminal matter in order to sanction him again. AUSA Gartner acknowledged that this fear was "unfounded," but noted that "it shows the depths of how much Mr. Brown was affected by what happened to him." (Gartner, TR: 1337.)

record." (Id. at 1250.)[17] Fear that Judge McBryde might repeat his conduct during Dawson has also substantially complicated the settlement process for the Civil Division:

> "It is an absolutely continuing struggle in every case that we have to make sure the settlement offers we make or do not make are influenced only by our best litigation judgment and not by some fear of personal reprisal for what may or may not happen." (Id. at 1257-58.)

The Special Committee does not review here the legal or factual accuracy of Judge McBryde's determinations in Dawson. As noted, those determinations were reversed by the Fifth Circuit. Nevertheless, the Special Committee takes Judge McBryde's conduct in Dawson as described by the Fifth Circuit's opinion into account to the extent that this conduct relates to certain patterns of behavior on his part. As in the Anderson case, Judge McBryde showed a disturbing propensity to make allegations of "fabrication" and "bad faith" against government attorneys appearing before him based on what ultimately was a disagreement over legal principles. As in the Van Waeyenberghe case, Judge McBryde turned a principled decision not to settle a case into "bad faith" by public servants, accompanied by highly vitriolic and abusive attacks on the integrity of officers of the court. These patterns of conduct continue.

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[17] During cross-examination of AUSA Barta, counsel for Judge McBryde suggested that the real cause of any decline in morale at the U.S. Attorney's Office was Judge McBryde's sanctioning of AUSA Randy Means in the Chillcut case, which was affirmed by the Fifth Circuit. See Chillcut v. United States, 4 F.3d 1313 (5th Cir. 1993). AUSA Barta explained that Chillcut and Dawson were different in that the Office acknowledged fault in the Chillcut case, but vigorously denied any wrongdoing in Dawson. In its appeal to the Fifth Circuit in Chillcut, the Government did not challenge the imposition of sanctions, but only challenged that portion of Judge McBryde's order which prevented AUSA Means from seeking reimbursement from the Government for the sanctions imposed upon him. The Fifth Circuit's opinion in Chillcut addressed not only this issue, but also went on to criticize Means at length. Barta agreed that this opinion adversely affected the morale of the Office.

8. Charge of a Conspiracy to Subvert the Sentencing Guidelines (Spring 1993)

Mr. Ira Kirkendoll, the Federal Public Defender for the Northern District of Texas, testified about a meeting he had with Judge McBryde in the spring of 1993. Judge McBryde had summoned Mr. Kirkendoll to his chambers to discuss concerns he had with the Fort Worth branch of the Public Defender's Office. During the course of the meeting, Judge McBryde told Mr. Kirkendoll that he was concerned with the relationship between Mr. Kirkendoll's attorneys and the U.S. Attorney's Office. Judge McBryde indicated to Mr. Kirkendoll that he suspected that the Public Defenders and the U.S. Attorneys were engaged in a "collusive effort" to subvert the Sentencing Guidelines. (Kirkendoll, TR: 865-67.) Judge McBryde presented this as a "grievance[]" which did not invite a response. (Id. at 865.)

At the Special Committee's hearing, Mr. Kirkendoll vigorously denied any conspiracy to subvert the Sentencing Guidelines. He said that any such conspiracy would be "absurd" and that both the Public Defender's Office and the U.S. Attorney's Office were vigorous advocates who had an appropriate and professional relationship. (Id. at 865-66.)

At the hearing, Judge McBryde did not dispute Mr. Kirkendoll's testimony concerning the allegations he made against the Public Defender's Office and U.S. Attorney's Office. Judge McBryde also did not dispute Mr. Kirkendoll's testimony that there was no basis for these allegations.

The Special Committee concludes that there was no basis for Judge McBryde's highly inflammatory allegations of "collusion" between the two offices. These allegations must be viewed in the context of Judge McBryde's repeated attacks (in such matters as Turner, Anderson, and Dawson) on the U.S. Attorney's Office and the Public Defender's Office, both with respect to individual attorneys and with respect to these offices overall. As Messrs. Barta and Kirkendoll testified, these attacks seriously harmed morale and drove away competent attorneys from these two offices.

9. Barring of Matt Golla (July 1993)

The Special Committee heard testimony regarding Judge McBryde's decision to bar Assistant Federal Public Defender Matt Golla from his courtroom. These events were described by Mr. Golla, Mr. Paul Stickney and Judge McBryde.

Mr. Golla represented Michael Angelo Davis in a Hobbs Act robbery case before Judge McBryde. Mr. Davis admitted committing the robberies in question, but denied using a firearm during the robberies. As Mr. Golla described for the Special Committee, the key issue for the defense was discrediting those witnesses who testified that they thought Mr. Davis had brandished a gun.

During jury deliberations, the jury sent the court two notes — the first asking to hear the testimony of the first three witnesses and a second clarifying note asking to hear testimony relating to the description of the alleged gun or weapon and/or use of and any statement or threat about having a gun. Judge McBryde called Mr. Golla and Assistant United States Attorney Chris Stokes into chambers to discuss how to respond to the jury's second note. The jury had not identified the witnesses whose testimony with respect to the gun description it wanted to hear, but it did mention the first three witnesses. As the first three witnesses had not described a gun, however, it was not entirely clear to whom the jury was referring.

According to Mr. Golla, Judge McBryde explained to Mr. Golla and Mr. Stokes that he believed the jury was referring to witnesses Derden, Watson and Pace because, to his recollection, Mr. Derden had testified that he had seen the barrel of a gun, Ms. Watson had testified to the same effect and Ms. Pace had testified that she was threatened by an individual who said he had a gun. Mr. Golla agreed with Judge McBryde that Derden, Watson and Pace were the witnesses to whom the jury was referring, and he believed that Judge McBryde would simply identify those three witnesses for the jury but would not comment upon why he believed they were the three witnesses.

Following the conference in Judge McBryde's chambers, Judge McBryde returned to the courtroom and called in the jury. He proceeded to identify the three likely witnesses and then

went on to describe the witnesses' testimony relating to the gun — exactly what Mr. Golla believed the Judge would not do:

> "THE COURT: Okay. I have the second note that you have written, which says, "We would like to hear the testimony relating to the description of the alleged gun or weapon and/or use of and any statement or threat about having a gun."
>
> I'm reading this in context with the earlier note, and the earlier note made reference to the first three witnesses. So I assume you are talking about — and I have gone over this with the attorneys. We assume you are talking about the witnesses Derden, Watson and Pace. And I am not asking anybody to give me any answers now. I'm just going to give you some explanations and then suggest you go back and write me another note. But I assume you are talking about Derden, Watson and Pace, and the lawyers agree that I can tell you the reason we assume that is that Derden — I think he was the very first witness, and he mentioned seeing the end of the gun. Watson, I don't know that she was the second witness, but she was the second witness about a robbery. There may have been a witness in between who testified on the subject of where the merchandise was purchased. Watson was the second witness about a robbery, if our notes are correct, and she also said that she saw the end of a gun.
>
> And then Pace, she — quite frankly, I haven't tried to find out where in the sequence she testified, but she was one of the victims of a robbery. She was not the third or fourth witness. But, in any event, she was after Watson. She was the fourth witness after Watson. But she's the one who got the license number and who testified that she was threatened, whoever performed the robbery said something about having a gun. I am not trying to say exactly what she said.
>
> So that is how we conclude that those are the three that you are interested in." (Exh. C-8, at 110-111.)

When Judge McBryde responded to the jury's note as reflected above, Mr. Golla moved for a mistrial. Mr. Golla believed that the Judge's commentary on the evidence was

prejudicial to his client and that it was important for the jury to hear the full testimony of all three witnesses (both direct and cross-examination) on the key defense issue in the case, without commentary from the Court. Mr. Golla did not believe that he agreed to have Judge McBryde respond to the jury's note as he did. He believed that he agreed to have Judge McBryde identify Derden, Watson and Pace as the three witnesses in whose testimony the jury was interested. Mr. Golla testified that he did not want Judge McBryde to comment on the evidence because it did not allow the entire record on the key issue to be presented to the jury.

According to Judge McBryde, it was crystal clear at the end of the chambers conference that he intended to tell the jury exactly what he in fact told the jury as reflected in the transcript. Judge McBryde testified that he believed (and continues to believe) that Mr. Golla purposefully sandbagged him by agreeing to his proposal in chambers and then attacking it later in court.

Mr. Golla was upset by the incident and believed that Judge McBryde had treated him unfairly by implying in open court that he was a liar.[18] When he encountered Judge McBryde in the courthouse the next day, Mr. Golla did not acknowledge him. Upon returning to the office, he learned of a phone call Judge McBryde had placed to Paul Stickney, the First Assistant Public Defender. As Mr. Stickney testified, Judge McBryde called and told him that he had had an incident with Mr. Golla and he was ordering that Golla never appear in his courtroom again.

Judge McBryde placed a second call some time later that day to Stickney in which he indicated that he had rethought his earlier directive. Judge McBryde told Mr. Stickney that he would allow Mr. Golla to conclude his current cases, but that he would prefer that he did not appear before him again on any new matters. Judge McBryde also indicated that it would be

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[18] Judge McBryde stated on the record after Mr. Golla moved for a mistrial that: "I will learn from now on when I have any conversation with you concerning a case it will be in the presence of a court reporter..." (Exh. C-8, at 115.)

prudent for Mr. Golla to be transferred out of the Fort Worth office so that he would not be the attorney on cases that could be transferred to Judge McBryde. Mr. Stickney described this second phone call as being less than a direct order, but that Judge McBryde's tone had not moderated as compared with the first call in which he had ordered that Mr. Golla was never to appear in his courtroom again. Judge McBryde did not dispute Mr. Stickney's recounting of the two telephone conversations. A contemporaneously drafted e-mail memorandum from Mr. Stickney to Mr. Ira Kirkendoll, the Federal Public Defender for the Northern District of Texas, reflects the substance of the two conversations between Judge McBryde and Mr. Stickney and was introduced as a Committee Exhibit.

Although Mr. Golla's supervisors believed that Mr. Golla had done nothing to warrant being barred from Judge McBryde's court, they elected, after weighing the pros and cons, to submit to Judge McBryde's wishes based on their belief that failure to do so would result in retaliation by Judge McBryde on the office and would ultimately have a negative impact on their clients. Mr. Golla subsequently transferred to the Dallas office, and Mr. Stickney transferred from Dallas to Forth Worth.

While Judge McBryde clearly believed (and believes) that Mr. Golla intentionally misled him in the Davis case, the Special Committee does not doubt Mr. Golla's testimony that he did not understand that Judge McBryde would do more than identify the three witnesses. It is logical that Mr. Golla would not have wanted Judge McBryde to provide the jury with a partial summary of the testimony of the three key witnesses regarding the central (and only) defense issue in the case.[19] In addition to the logic of Mr. Golla's position, we find it highly unlikely that Mr. Golla, a young attorney who had committed himself to practice in Fort Worth where he would be required to

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[19] Judge McBryde conceded as much when he told the Committee that he would have had no problem with Mr. Golla's raising the objection per se, but that he objected to what he perceived as deception on Mr. Golla's part. Indeed, after Mr. Golla had raised the objection, Judge McBryde had the full testimony, including direct and cross, of each of the witnesses on the subject of the gun read verbatim to the jury.

appear before Judge McBryde repeatedly, would purposefully and so blatantly have "sandbagged" Judge McBryde.[20]

The circumstances surrounding this incident strongly suggest a misunderstanding. After an oral exchange, Mr. Golla believed Judge McBryde would do one thing, while Judge McBryde and AUSA Stokes believed he would do another. Just as in the matter involving Lonnie Woods which is discussed infra, Judge McBryde left no room for the possibility of a misunderstanding and concluded that an officer of the court intentionally lied to him. To make matters worse, Judge McBryde imposed on Mr. Golla what was, in effect, an extremely severe personal sanction, as well as a further edict (the Fourth Floor Order was already in effect at the time) to the Federal Public Defender about how to run that office.

10. Sanders Departure (October 1993)

The Special Committee heard testimony from former AUSA Michael Sanders concerning his experiences before Judge McBryde which led him to leave the U.S. Attorney's Office.

Sanders worked as an agent for the Internal Revenue Service from 1977 to 1986. At that time, he took a leave of absence to go to law school. In 1991, Sanders joined the U.S. Attorney's Office and was sworn in by Judge McBryde. He described his swearing in as follows:

> "I was extremely proud and my wife was there. It was a culmination of a lot of hard work, a lot of effort, some sacrifice that my family went through, some money spent to get my education. I had come from basically the bottom of the federal law enforcement scale up to what I considered the top." (M. Sanders, TR: 893.)

Mr. Sanders enjoyed working as an AUSA and believed that he did the job well. Nevertheless, in October 1993, Sanders left the U.S. Attorney's Office and returned to the IRS to

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[20] Judge McBryde also testified that he had had other "bad experiences" prior to the Davis case where he had questioned Mr. Golla's honesty. He was unable to identify any of these incidents, however. The Committee heard no evidence justifying Judge McBryde's treatment of Mr. Golla.

resume his work there as an agent. He explained that this decision was motivated by his experiences appearing before Judge McBryde.

Sanders initially described his experience in United States v. Crowell, 4:92-CR-139-A. In this case, the defendant was charged with participating in a fraudulent investment scheme. Sanders was the prosecutor. In the course of the litigation, Judge McBryde rejected two plea bargains, thereby forcing the matter to go to trial. The conviction was ultimately upheld, but the sentence reversed on the ground that Judge McBryde improperly participated in plea negotiations in violation of Federal Rule of Criminal Procedure 11(e)(1). See United States v. Crowell, 60 F.3d 199 (5th Cir. 1995).

In the course of the trial, Sanders planned to call an expert witness to testify on certain financial data. The defense attorneys objected that certain schedules of these data, upon which the expert was relying, had not been produced to them. Sanders responded that the defendant already had the underlying data that was presented in the schedules. Judge McBryde eventually permitted the expert witness to testify, but accused Mr. Sanders of adopting "a sort of cat-and-mouse approach to discovery." (Exh. C-86, at 76.) Sanders denied that he had intentionally withheld those materials from defense counsel.

Following this experience, Mr. Sanders began to reflect on his experiences before Judge McBryde, in particular the Anderson case (described above), in which he assisted AUSA Schattman. Based on his own experience in that matter, Sanders knew (as the Fifth Circuit held) that the alleged "special relationship" between AUSA Schattman and the defendant's uncle had no influence on the plea agreement between the government and the defendant. As noted above, Sanders also knew that the decision to dismiss the indictment of Anderson was appropriate in order to maintain the government's credibility with other future defendants who wished to cooperate with the government.

Based upon his experiences in Anderson and Crowell, as well as his knowledge of other incidents involving Judge McBryde, Sanders decided to leave the U.S. Attorney's Office and return to the IRS. He explained as follows:

> "I felt like there was an aura or kind of cloud hanging over us or me or anyone in the office, I guess, that you really didn't know if you made a technical error or minor error what was going to happen or how the court would react." (M. Sanders, TR: 902.)
>
> "[B]ased on the way the court handled the Anderson matter, other things that I have heard about and the fact that he jumps on me for what I considered was very minor, I just didn't want to take the chance that someday I might have my law license handed to me on a platter.
>
> I had worked hard to get it. I had approximately 15 years left before I could retire from government service. With Judge Mahon and Judge Belew in senior status, that meant probably half of my cases were going to be before Judge McBryde, so I had a choice to make. I had a place to go. Other people don't have places to go. So I went back to the Service after many, many hours of discussing this with my wife. It was certainly a decision that wasn't taken lightly." (Id. at 902-03.)

Sanders took a substantial pay cut in returning to the IRS. He considered transferring to the Dallas U.S. Attorney's Office, but this would have required him to move, as he and his family live approximately forty minutes northwest of Fort Worth.

11. Contempt for a Teleconference Failure (January 1994)

AUSA John Teakell was the prosecutor in the case United States v. Cushman, 4:93-CR-015-A. During the late afternoon on January 25, 1994 at approximately 4:00 PM, one of Judge McBryde's law clerks contacted Teakell and requested that he set up a conference call in which the court, AUSA Teakell, and the two defense attorneys (Messrs. Quentin McGown and Jack Beech) would discuss the jury charge in the case. The conference call was set for 4:30 PM.

Mr. Teakell's secretary had difficulty connecting all of the parties to the call. After additional efforts, she received a call from Judge McBryde's chambers on a different line indicating that the conference call was canceled and that Judge McBryde wanted the attorneys to come to his chambers for a hearing.

In the course of the ensuing hearing, Judge McBryde questioned and criticized Mr. Teakell at length about the

telephone system at the U.S. Attorney's Office. Judge McBryde then stated on the record that he considered Mr. Teakell to be in "contempt of court" because of his secretary's difficulties in setting up the call:

> "THE COURT: Mr. Teakell, why didn't we have a conference call set up at 4:30 on this?
>
> For the record, I have instructed Counsel to have a conference call set up at 4:30, and it's now 5:20. And it is my understanding Mr. Beech has just now arrived.
>
> MR. TEAKELL: Your Honor, we had attempted to have one set up by then. Our office is using the Sprint System, which the office on a whole has been dissatisfied with, because they are very slow. And when your law clerk called and asked him where the conference call was and what stage he was in, we were still waiting at that time.
>
> THE COURT: Okay. I think we asked over half an hour before 4:30 that there be a conference call at 4:30.
>
> MR. TEAKELL: Yes, sir.
>
> THE COURT: Or do you not have access to any other system to make a conference call through?
>
> MR. TEAKELL: We have —
>
> THE COURT: AT&T?
>
> MR. TEAKELL: We have to go outside, and we are supposed to use Sprint, and they tell us —
>
> THE COURT: Well, I have instructed your people, Mr. Teakell, I don't know how many times, that I am not going to put up with that nonsense. If there is another way to make a conference call, you make the conference call the other way. Now, is there another way to make one?
>
> MR. TEAKELL: I suppose we could use AT&T. I am not sure.
>
> THE COURT: Okay. Well I don't know how many times I have instructed your office to use AT&T, if that's what it takes to get a conference call set up.
>
> I consider that you are in contempt of court in not complying with my direction and setting up a conference call at 4:30. I am not going to take any further action on that at this time, Mr. Teakell. But when I instruct a lawyer to have a conference call set up, I expect that to be set up.

I have wasted almost an hour of my time because of you not doing what I told you to do.

MR. TEAKELL: Yes, sir. And I am going to recommend to our office that we — that some other system be implemented because this —-

THE COURT: Mr. Teakell, it's not a matter of implementing another system. It's a matter of when I say, 'set up a conference call,' you get on that phone to anybody you have to get on that phone to get it done.[21]

MR. TEAKELL: Yes, sir.

THE COURT: We are not talking about implementing. I am talking about getting a conference call set up.

MR. TEAKELL: Yes, sir.

THE COURT: And we have been down this road before with your office, Mr. Teakell. And I have told your people several times that I am not going to put up with this nonsense of trying to use some system that doesn't work. I want you to use a system that does work, and I want it used right then.

MR. TEAKELL: Yes, sir." (Exh. C-96, at 4-7 (emphasis added).)

In testimony before the Special Committee, AUSA Teakell described Judge McBryde's demeanor in the course of the preceding colloquy as follows:

"[H]e was extremely agitated, very belligerent toward me and he was obviously very upset. I took it as being very vicious." (Teakell, TR: 611.)

Mr. Gartner later testified that Teakell was "terrified" about testifying before the Special Committee about the teleconference incident. Following his appearance before the Committee, Teakell suggested that he be reassigned from the

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[21] Judge McBryde was shown a memorandum prepared by AUSA Teakell's assistant detailing her efforts to set up this call — which included twice reminding the Sprint operator that a federal judge was on the line. Judge McBryde testified that he probably learned of these efforts on the part of the U.S. Attorney's Office after the incident with AUSA Teakell. Despite learning of Mr. Teakell's efforts to get the call set up, Judge McBryde never apologized to Mr. Teakell for his conduct that day.

retrial of the Cushman case which was then pending before Judge McBryde.[22] He subsequently accepted a six-month temporary assignment in another district.

When questioned about this incident Judge McBryde confirmed that he knew, at that time, that Mr. Teakell was not personally responsible for choosing the telephone system used by the U.S. Attorney's Office and was not personally at fault for the difficulties experienced in setting up this conference call. When asked whether it was fair to hold Mr. Teakell in contempt for a failure of system set up by others affiliated with the United States Attorney's Office, Judge McBryde stated that "on the surface" holding AUSA Teakell in contempt did not appear to be fair. (McBryde, TR: 1055.) Nevertheless, Judge McBryde never apologized to AUSA Teakell.

When asked whether he showed empathy for Mr. Teakell in holding him in contempt of court, Judge McBryde responded that trial lawyers have to have "tough skin" and added:

> "Things like that have been said to me by judges over the years. It didn't hurt my feelings. That's part of our business." (McBryde, TR: 1205-06.)

12. Peter Fleury Arrest (September 1994)

The Special Committee heard testimony regarding Judge McBryde's ordering Assistant Public Defender Peter Fleury incarcerated because of his uncertainty over a question of attorney-client privilege and his effort to avoid waiving this privilege without some time to research the issue.

Mr. Fleury's client, Bradley Ray Sargent, filed a motion to substitute counsel alleging that he had lost confidence in Mr. Fleury. At the hearing on the motion, Judge McBryde inquired of Mr. Sargent why he wanted Mr. Fleury replaced. Among other things, Mr. Sargent alleged that Mr. Fleury had failed to show him certain police records.

Judge McBryde immediately asked Mr. Fleury whether he had in fact shown Mr. Sargent the police records. Understand-

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[22] One of the Cushman-related cases is now pending again before Judge McBryde after the Fifth Circuit vacated the convictions in this case based upon the Judge's limitation of cross-examination of a cooperating witness. See United States v. Landerman, 109 F.3d 1053 (5th Cir. 1997).

ably concerned when faced with this question, the answer to which would suggest that his client was lying to the Court, Mr. Fleury attempted to object to being required to answer the question on the ground of attorney-client privilege and on the general principle that he should not be forced to make a statement detrimental to his client's interests.[23] As the following excerpt from the transcript reflects, Judge McBryde did not allow Mr. Fleury to explain his dilemma or even voice the basis for his objection.

> "THE COURT: . . . . The third reason is that you wanted to see some records Mr. Fleury had in his file and he hasn't let you see them.
>
> Do you know what he's talking about, Mr. Fleury, on that?
>
> MR. FLEURY: Yes, Your Honor. I don't want to be in a position where I'm responding to —
>
> THE COURT: You're responding to my questions, Mr. Fleury. What records is he talking about?

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[23] As Mr. Fleury explained to the Committee:

> Well, as I've said, if the answer to the question — which it ultimately was that I did show my client the police reports and my client had just perjured himself — at least he had jeopardized any chance he had to get acceptance of responsibility in a case in which he ultimately pled guilty and which I anticipated there would be a plea of guilty to something in the case because they had overwhelming evidence against him on the majority of the counts.
>
> In addition to acceptance of responsibility, the other thing, other than a substantive criminal charge for a new offense involving a lie to the court, you can get two points under the guidelines for the obstruction of justice. It doesn't mean a criminal offense, but something that happens in this case that increases your — so it could be a five point swing for the man, which with his criminal history and the robbery offenses he had would have been a whole lot of time. The whole issue is he's saying he has lost confidence in me and I'm being asked to, in effect, give him more time by my answer. (Fleury, TR: 223-234.)

MR. FLEURY: Police reports.

THE COURT: And have you shown them to him?

MR. FLEURY: Again, Your Honor, it puts me —

THE COURT: I'm asking you to respond to my question, Mr. Fleury. Have you shown him the police report?

MR. FLEURY: I object to the question, because —

THE COURT: Do you want to answer my questions or not, Mr. Fleury? I'm ordering you to answer my question. Have you shown him the police report?

MR. FLEURY: May I make my objection first, Your Honor?

THE COURT: You have made your objection. Now have you shown him the police report?

MR. FLEURY: I don't think I can answer that, Your Honor.

THE COURT: Mr. Fleury, you will be taken into custody and taken downstairs until you're ready to answer my question unless you're now ready to answer my question.

MR. FLEURY: It's attorney/client privilege.

THE COURT: Okay. Mr. Fleury will be taken into custody and kept downstairs until he's ready to answer my question.

Mr. Fleury, if you wish to make known to the Marshal's Office when you're ready to answer my question, we'll hear you at that time." (Exh. C-15, at 7-8.)

As the excerpt above demonstrates, Judge McBryde did not give Mr. Fleury the opportunity even to state what his legal objection was, let alone to research the underlying legal question, nor did he give him time to consult with his client, prior to ordering him into custody.

Judge McBryde resumed the hearing later that day and demanded once again that Mr. Fleury answer his question. Still believing that he could not answer the question, but not having been afforded time to research the issue, Mr. Fleury was permitted to consult briefly with two of his colleagues who were then present in court. Although they told him that they had not had sufficient time to research the issue because they had been

focused on how to get him released from custody and not the privilege question, they concurred with Mr. Fleury's "gut" reaction that he should not answer the question. Judge McBryde then ordered Mr. Fleury incarcerated until he was ready to answer the question.[24]

Even after hearing Mr. Fleury describe his thought process in these proceedings and his hope that he would have been allowed to explain his position fully to Judge McBryde, to research the issue or, at a minimum, to consult with his client; even after hearing First Assistant Public Defender Paul Stickney describe that he and his colleagues were deeply concerned for Mr. Fleury's safety while he was in jail; and even after hearing Mr. Fleury himself describe the fear he had for his own safety in the face of being incarcerated with persons he had represented and who may have believed him responsible in some way for their incarceration, Judge McBryde maintained that his handling of the situation was appropriate under the circumstances.

Although the Special Committee has no quarrel with Judge McBryde's and the Fifth Circuit's legal determination that the attorney-client privilege was not a valid basis for Mr. Fleury's refusal to answer Judge McBryde's question, Judge McBryde's treatment of Mr. Fleury, an attorney who had at that time appeared before him numerous times, was appalling under the circumstances. There was no exigency warranting this treatment of Mr. Fleury, other than the self-defined exigency of Judge McBryde to complete the proceeding once it had begun.

13. Judge Thomas Lowe (March 1995)

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[24] On behalf of Mr. Fleury, the Public Defender's Office filed an emergency mandamus petition in which it sought a stay of Judge McBryde's incarceration order pending a determination of the underlying privilege question. The Fifth Circuit granted the stay, and Mr. Fleury was released from custody. The Fifth Circuit subsequently determined that: "The district court did not commit clear error in concluding that a response to the court's question would not violate the attorney-client privilege. This determination should allay counsel's concerns in this respect and permit counsel to respond to the court's question. The district court should not inquire further concerning Fleury's relationship with his client without first determining that an answer would not violate the attorney-client privilege." (Exhibit C-18.)

In March 1995, a conflict arose between a trial scheduled in Tarrant County State Court before the Hon. Thomas Lowe and a pretrial conference before Judge McBryde. Jay Gray was counsel for the plaintiff in Anderton v. Breceda (before Judge Lowe) which was set to go to trial on March 27, 1995; he was also counsel for the plaintiff in Brito v. Intex Aviation Services, Inc. (before Judge McBryde), which had a pretrial conference set for 9:30 AM on March 28.

On the morning of March 27, 1997, Mr. Gray filed a motion for a continuance with Judge McBryde asking that the pretrial conference be continued in light of the state court trial in the Anderton case. Jury selection commenced in Anderton that afternoon, with Judge Lowe presiding. At approximately 5:00 PM, one of Judge McBryde's law clerks notified Mr. Gray's office that the motion for a continuance was denied and that the pretrial conference in Brito would go forward as scheduled at 9:30 AM the next morning.

When Mr. Gray learned of this decision, he was surprised, as he understood that jury trials (whether in state or federal court) usually took precedence over pretrial and other procedural conferences involving only attorneys and a judge. Mr. Gray approached Judge Lowe and notified him of the apparent conflict between the trial and the conference. Judge Lowe suggested that Mr. Gray arrive early the next morning at 8:00 AM, so that they could call Judge McBryde together and explain the situation. Judge Lowe thought that perhaps Judge McBryde did not believe that Mr. Gray was actually in trial and he hoped to confirm this fact.

Accordingly, Mr. Gray arrived at Judge Lowe's chambers on the morning of March 28, 1997 at 8:00 AM. At that time, Judge Lowe placed a call to Judge McBryde's chambers. He was told by one of Judge McBryde's law clerks that the Judge was not in, but was expected shortly. Judge Lowe indicated that Mr. Gray was appearing in a trial before him and that this trial was set to resume at 8:30 AM. Judge Lowe asked the law clerk to inform Judge McBryde of this and asked that Judge McBryde call as soon as possible. Judge Lowe indicated that he would leave the bench to receive Judge McBryde's call.

The trial resumed and both Mr. Gray and defense counsel gave opening statements. Mr. Gray recalls being nervous during his opening statement because he was concerned about the pending conference before Judge McBryde. No call had been received from Judge McBryde by 9:10 AM. Accordingly, at that point, Judge Lowe recessed trial so that Mr. Gray could attend the pretrial conference before Judge McBryde.

Judge Lowe also decided to visit Judge McBryde's chambers in order to inform him personally that Mr. Gray was in fact in trial and that a jury was in recess awaiting his return.

Judge Lowe arrived at Judge McBryde's chambers before Mr. Gray. He was directed into a conference room where two defense counsel in the Brito case were awaiting the start of the pretrial conference. Judge Lowe signed in along with his court reporter, who had driven him to the federal court. (The court reporter did not have any stenographic equipment with her.) At approximately 9:30 AM, one of Judge McBryde's law clerks approached Judge Lowe. The clerk was "stammering and red-faced" and said to Lowe: "Judge, I just feel terrible about this, but I have been given a message to give to you." The clerk then informed Lowe that "Judge McBryde told me to tell you that you are not welcome here and you are to leave." (Lowe, TR: 64.) Judge Lowe was "stunned" by this statement. After a few moments, Judge Lowe and his assistant left Judge McBryde's chambers.

Outside the chambers, they met the law clerk who had delivered Judge McBryde's message. The law clerk was apologetic to Judge Lowe for what had happened. Judge Lowe told the clerk that he did not hold this incident against him since he was only doing his job. He asked the clerk to convey to Judge McBryde that he would appreciate it if he would release Mr. Gray as soon as possible.

When Judge Lowe returned to his chambers, he immediately wrote Judge McBryde a detailed letter recounting the preceding incidents, explaining that:

"Since I had not heard from you, I came to your Court hoping to speak with you privately. My purpose was simply to inform you personally that Mr. Gray was, indeed, in trial before this Court, and that a jury was in recess awaiting his return, and

that your releasing him to return to this Court as soon as possible would be appreciated." (Exh. C-7)

At the end of this letter, he stated:

> "I simply wish to avoid further waste of taxpayers' expense now and in the future. I would welcome any suggestions or guidance which you might wish to give me in that regard.
>
> My private line is [phone number listed]. I would appreciate your call at your convenience." (Exh. C-7)

Judge Lowe never received any response from Judge McBryde to this letter, either in writing or by telephone.[25]

When asked why he refused to see Judge Lowe or to have one of his staff inquire of Judge Lowe as to why he had come to Judge McBryde's chambers, Judge McBryde responded simply that it was "inappropriate" for Judge Lowe to "intrud[e]" into his conference room and that he (Judge McBryde) "assumed" that Judge Lowe was there "to engage in some kind of inappropriate activity." (McBryde, TR: 1031-32.) This assumption was made without any attempt by Judge McBryde actually to ask Judge Lowe what his purpose was:

> "Q. Did you ask anybody on your staff to go out and ask Judge Lowe why he was there?"
>
> A. No, I didn't.
>
> Q. Do you think that would have been a courteous thing to do?
>
> A. I didn't think at this time it was an appropriate thing to do, under the circumstances, for them to be intruding in my courtroom. I didn't think anything was necessary for me to do other than to invite him to leave my conference room.
>
> Q. You have a fellow judge who has come over trying to see you and he is waiting outside and my question is, simply, don't you think it would have been a courteous,

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[25] Judge McBryde later added that he saw Judge Lowe a few days later in an elevator and "it was clear from our visit that I had no ill will toward him." (McBryde, TR: 1035.) Judge McBryde mentioned that he had received the letter but did not discuss the contents of the letter.

appropriate thing to do to send somebody out to ask the state judge what he wants?"

A. Well, I have already answered that. No, I did not think that was an appropriate thing to do under the circumstances. Bear in mind that's a private conference room that I have a conference scheduled in at 9:30, and apparently the attorneys for the defense were already in that conference room. I didn't know whether he was there for the purpose of creating a confrontation of some kind. I simply did not know what he was there for. I was told he was there with a court reporter. I assumed that it was to engage in some kind of inappropriate activity on his part and — go ahead.

Q. Did you ask anybody to find out whether the court reporter had a Stenograph machine?

A. Mr. Fiske, I don't know how many times I can tell you. I did not ask somebody to go up and find out why he was there. It was simply inappropriate, whatever the reason was, for him to be in my private conference room with a court reporter, when I was beginning to engage in a pretrial conference with one of my cases." (McBryde, TR: 1031-32 (emphasis added).)

Thus, as in a number of matters reviewed by the Committee, Judge McBryde here showed a disturbing inclination to conclude that an individual (here a state court judge) was motivated by a nefarious purpose without engaging in even the most basic inquiry to determine whether this suspicion was justified.[26]

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[26] During the hearing before the Special Committee, counsel for Judge McBryde suggested Mr. Gray was aware of the conflict between the Anderton and Brito cases a month in advance and failed to notify Judges Lowe and McBryde in a timely manner of this conflict. Mr. Gray testified that he had expected the Anderton case to settle prior to trial as most of his cases do, and only became sure that the case would go to trial on the evening of Sunday, March 26, 1995. It did not make sense to seek a continuance from Judge McBryde earlier because there was a good chance that the conflict would have disappeared by the time of the pretrial conference. The Special Committee finds this explanation not unreasonable. Of more importance, however, the Special Committee concludes that the timeliness

Our federal system of justice, whether viewed from the grand perspective of the Framers or the mundane perspective of daily operation, requires many things, including coordination and respect between the federal and state judicial systems. Judge McBryde's treatment of Judge Lowe constituted a conscious, deliberate decision to show disrespect to a state court judge. His conduct is an embarrassment to the entire federal judiciary. We would be deeply concerned if this were the only incident of Judge McBryde's disrespect for, and unwillingness to coordinate with, other judges. The Special Committee is sad to say that it is not.

14. Satz (April 1995)

The facts of the criminal trial in United States v. Eric Michael Satz, No. 4:94-CR-094-R (N.D. Tex.), as well as the conflict over the reassignment of this case from Judge McBryde to Judge Buchmeyer are summarized in opinions of the Fifth Circuit and will not be reviewed at length here. See generally United States v. Gray, 105 F.3d 956, 961-62 (5th Cir. 1997); In re McBryde, 117 F.3d 208 (5th Cir. 1997).

Michael Satz was indicted and later convicted in separate proceedings first in Phoenix, Arizona, and then in Fort Worth, Texas. AUSA Darcy Cerow was the prosecutor in Phoenix. The Phoenix case was assigned to Judge Paul G. Rosenblatt, and the Fort Worth case to Judge McBryde. Judge Rosenblatt eventually scheduled Satz's sentencing in Phoenix for May 15, 1995 and, shortly thereafter, Judge McBryde scheduled the sentencing in Fort Worth for April 28, 1995.

Investigation into related criminal activity by Satz's co-conspirators continued in Phoenix. After extended negotiations, on March 27, 1995, certain co-conspirators (the Schwartzes) pled guilty before Judge Rosenblatt to certain criminal activity. In their plea bargains, the Schwartzes agreed to cooperate with law enforcement authorities in their continuing investigation.

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of Mr. Gray's motion is irrelevant to evaluating Judge McBryde's conduct toward Judge Lowe, since Judge McBryde was unaware of this issue at the time. Furthermore, even if Mr. Gray had not acted in a timely manner, this would not excuse Judge McBryde's conduct towards Judge Lowe.

Sealing orders were entered by Judge Rosenblatt in connection with these plea agreements.

On April 4, 1995, AUSA Umphres moved to continue Satz's Texas sentencing until June 23 for several reasons, including the difficulty of bringing Satz to Texas, the ongoing investigation into the activities of Satz and his co-conspirators in Arizona, and a split between the Fifth and Ninth Circuits concerning a Double Jeopardy issue raised by Satz's sentencing.

Satz filed a motion to be transferred to Fort Worth for sentencing with the Arizona District Court, which Judge Paul G. Rosenblatt denied on April 17. When he learned of this order, Judge McBryde called Judge Rosenblatt and persuaded him to agree to transfer Satz to Fort Worth. Judge Rosenblatt said nothing to Judge McBryde to suggest that they arrange the order of sentencing to the detriment of Satz. On April 18, Judge McBryde denied AUSA Umphres' motion to continue Satz's Texas sentencing.

On April 21, AUSA Umphres filed under seal a renewed motion to continue sentencing. The motion made specific reference to the sensitivity of the information relating to the ongoing investigation, and explained that disclosure could jeopardize the investigation. It also attached a copy of a supplemental sentencing memorandum, which referred to the fact that information was under seal in the Arizona proceeding and to AUSA Cerow's reasons for seeking to seal that proceeding in the first place.[27]

Later in the day on April 21, Judge McBryde issued an order denying this motion and further stating that

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[27] The memorandum stated:

> "[AUSA Cerow] also told me that the plea agreements and factual resumes relating to the defendants had been filed under seal, as she wanted to keep the fact of their cooperation secret for the moment in order to avoid alerting other targets of her investigation, who she did not identify." In re McBryde, 117 F.3d at 211.

> "[t]he material provided in the [government's] report and its attachments strongly indicates that one or more representatives of the United States of America has engaged in conduct calculated to frustrate the objectives of sentencing in this action and to cause noncompliance with the order signed by the court in this action on April 18, 1995." In re McBryde, 117 F.3d at 211.

Judge McBryde instructed AUSA Cerow and Postal Inspector Whiteaker to appear at an April 24 hearing and to bring with them all information potentially relevant to Satz's sentencing.

Arrangements were made by the government for AUSA Cerow to be represented at the hearing by R. Joseph Sher, a trial lawyer with the Department of Justice. Prior to the hearing on April 24, Cerow and Sher faxed a copy of Judge McBryde's April 21 order to Judge Rosenblatt and spoke with Judge Rosenblatt about the proper response. Judge Rosenblatt told Cerow and Sher that the sealing orders he entered on March 27 "protect[ed] both the sources of the information and the information itself" and that no disclosure should be made to Judge McBryde, even ex parte, in camera, without prior consultation between Judges Rosenblatt and McBryde. (Rosenblatt, TR: 636-37; Exh. C-65.) Judge Rosenblatt told Cerow that he would be willing to discuss the sealing order with Judge McBryde by telephone.

The April 24 hearing then ensued. At this hearing, in response to Mr. Umphres' attempts to explain why a continuance was called for, Judge McBryde stated that "you want me to manipulate the proceedings so that you can get a better deal by me manipulating the proceedings." (Exh. C-66, at 8) Cerow and Sher then attempted to explain that the government was prohibited from turning over all of the information sought in Judge McBryde's April 21 order because some of this information was covered by a sealing order entered by Judge Rosenblatt. (Id. at 13-15.) When Judge McBryde pressed to know the contents of the sealing order itself, Sher responded that he had asked Judge Rosenblatt earlier that day to make available a redacted copy of the order, but that Judge Rosenblatt had refused to do so. AUSA Umphres suggested that Judge McBryde call Judge Rosenblatt directly. Judge McBryde

declined, stating "it's to the point where I should not be in the position [of] trying to persuade Judge Rosenblatt to do things." (Exh. C-66, at 28.) Judge McBryde concluded the April 24 hearing by suggesting his inclination to issue a show-cause criminal contempt order against AUSA Cerow or to dismiss the charges against Satz, or both.

The next day, April 25, Judge McBryde resumed hearings and proceeded to question Cerow and Whiteaker at length about the content and scope of Judge Rosenblatt's sealing order. Rather than calling Judge Rosenblatt as he had been invited to do, Judge McBryde expressed skepticism that AUSA Cerow and Whiteaker were prevented from disclosing information to him because of a sealing order in Arizona: "Well, I think there's been some game playing, some bad game playing, if not dishonesty." (Exh. C-67. at 42.)

During a recess in the proceeding, AUSA Cerow and Sher contacted Judge Rosenblatt again and described the proceedings before Judge McBryde. (Rosenblatt, TR: 638.) In response, Judge Rosenblatt faxed to Fort Worth an order which read as follows:

> "On March 27, 1995, a criminal proceeding relating to a Northern District of Texas, Ft. Worth Division, 4:94-CR-094-A, was filed in this Court. All matters pertaining to that proceeding were placed under seal by this Court and will so remain." (Exh. C-68.)

Judge Rosenblatt sent out this order "so [Judge McBryde] would have some reason to believe that what [Cerow] was telling him was true." (Rosenblatt, TR: 640.)

When presented with this order, Judge McBryde commented that: "It's so vague and general it doesn't tell me any more than I've already learned from the people here." (Exh. C-67, at 45.) He went on to indicate that he did not believe AUSA Cerow's description of the order was truthful:

> "My inclination so far, based on the information I have, is not to believe that there is an order of the kind that has been described by Ms. Cerow. I recognize that I have something from Judge Rosenblatt saying some kind of order has been entered in some case, but that doesn't tell me enough information to reach a conclusion that an order

of the kind Ms. Cerow has described has been entered." (Id. at 46.)

At the end of the hearing, Judge McBryde signed an order to show cause why "coercive measures" should not be taken to compel AUSA Cerow to disclose the information in question.

Later in the day on April 25, Judge Rosenblatt faxed a letter directly to Judge McBryde which read as follows:

> "If you decide to go forward with the sentencing, under the circumstances, please keep in mind that eventually [Satz] will be returned to [Phoenix] for sentencing and whatever you do might have ramifications on my sentence. I ask you to please consider this and not jeopardize my case or any other proceedings pending in my court." (Exh. C-69.)

Judge Rosenblatt sent this letter out of "frustration" at the treatment of AUSA Cerow and in an effort to convince Judge McBryde to call him to discuss the scope of the sealing order in Arizona. (Rosenblatt, TR: 640-41.)

Hearings resumed on April 26. In response to Judge Rosenblatt's letter of the April 25, Judge McBryde stated: "[A]pparently I have a different philosophy from Judge Rosenblatt on handling matters. I don't have the philosophy that you manipulate proceedings for the benefit of the government or the defendant." (Exh. C-70, at 5.) After further discussion, Judge McBryde ordered the text of Umphres' second motion to continue sentencing unsealed and revealed to Satz and his counsel. The unsealing order reached the information filed under seal on April 21, including the attached exhibit disclosing the Schwartzes' guilty pleas and agreements to cooperate with the government to further the Arizona criminal investigation. McBryde concluded the hearings with the following statements:

> "I find . . . that the contention by Ms. Cerow that she was prohibited by a secrecy order or some kind of order of the court in Arizona from making disclosures and delivering the information she was ordered to make . . . is a fabrication and it's not true. . . .
>
> I don't believe Ms. Cerow believes that any order that has been entered prohibits her from delivering that informa-

tion. I find that she does not believe that any order prohibited her from complying with my orders." (Id. at 50-51.)

The Special Committee will not address whether the evidence relied upon by Judge McBryde was sufficient at the time to justify his conclusions concerning the credibility of AUSA Cerow's and Postal Inspector Whiteaker's statements as to the scope of the sealing order. In the context of the present investigation, the Special Committee is concerned that Judge McBryde would have made such serious allegations against two public servants without contacting Judge Rosenblatt directly. When asked why he did not attempt to contact Judge Rosenblatt prior to making these serious finding, Judge McBryde simply stated:

> "I had a great deal of information that enabled me to reach a conclusion that what [AUSA Cerow] said was not true, and I didn't think it was necessary or appropriate for me to call Judge Rosenblatt to discuss the matter with him." (McBryde, TR: 1210.)

The Special Committee finds this explanation inadequate and inexplicable given the gravity of the allegations at issue, the collateral consequences to these public servants of the finding, and the fact that if he had called Judge Rosenblatt he would have learned that Judge Rosenblatt supported the statements AUSA Cerow had made about the existence and scope of the sealing order.

The Special Committee is also disturbed that Judge McBryde would suggest in open court that Judge Rosenblatt, a colleague on the federal bench, was attempting to "manipulate" proceedings to the detriment of the defendant in Satz. (Exh C-70, at 5.) Judge Rosenblatt vigorously denied this allegation and the Special Committee fully credits Judge Rosenblatt's testimony. The manner in which Judge McBryde attacked the integrity of Judge Rosenblatt is another example not only of Judge McBryde's questionable temperament but also of his unwillingness and inability to work effectively with other participants in the judicial system.

15. Torres (April 1995)

The facts of the Torres case are summarized at length in opinions of the Fifth Circuit in In re McBryde, 117 F.3d 208

(5th Cir. 1997), and will not be reviewed here except as necessary.

Torres was a wrongful death action commenced in 1990. It was settled in December 1991, for $200,000. The settlement was reflected in a final judgment dated December 20, 1991 which was prepared by counsel for the parties. Of this sum, $40,000 was earmarked for a minor plaintiff, Grecia Torres, a citizen of Mexico who had no intention of ever residing in the United States. The judgment directed that the $40,000 was to be deposited by the Clerk of the District Court "in an interest bearing account at the highest available rate of interest."

As a consequence of an inadvertent error in the Clerk's office, the money was never invested. The error went unnoticed for approximately three years. On March 16, 1995, during a routine review, Ms. Mary Ramos, the financial deputy for the Fort Worth Division, discovered that the $40,000 earmarked for Grecia Torres had never been deposited in an interest-bearing account. Ms. Ramos immediately took steps to place the money in a certificate of deposit. The next day, Ms. Pam Murphy, Deputy-in-charge of the Fort Worth office, contacted Ms. Nancy Doherty, the Clerk of the Northern District of Texas, and informed her of the error.

Nancy Doherty has been the Clerk of the Northern District of Texas for approximately fourteen years, serving under four different chief judges. When Ms. Murphy informed Ms. Doherty of the problem, Ms. Doherty instructed her to contact the Administrative Office of the United States Courts to find out what needed to be done to correct the problem. On March 23, the Administrative Office informed the Clerk's office that the only way to redress the problem would be for plaintiff's counsel to file a claim under the Federal Tort Claims Act (the "FTCA"). On March 24, Ms. Murphy met with Judge McBryde to inform him of the problems and the Administrative Office's advice.

On March 30, 1995, almost one week after his meeting with Ms. Murphy, Judge McBryde entered an order in the Torres case. Although he had received a letter from the Administrative Office which explained that the Federal Tort Claims Act provided the exclusive remedy in this situation, Judge McBryde stated that he was "not inclined to think" that

this was correct. After conducting what he called a "preliminary inquiry" (which did not establish that the Administrative Office's position was wrong) concerning whether the Administrative Office's conclusion was correct (McBryde, TR: 1186), Judge McBryde took the opportunity to express his "disappointment" that there would "even be a suggestion" that a FTCA claim was the proper remedy. (Exh. C-77.)

The order described the error in harsh terms, stating that the Clerk had "failed to comply" with the final judgment, and then, notwithstanding the obvious inadvertence of the error, proceeded to make several references to a "violation" of the order. (Id. at 1-4.) The March 30 order also expressed irritation that Judge McBryde had not been informed of the error for a "significant period of time" (in reality, only eight days had elapsed after the failure was discovered, during which the Clerk was searching for a solution to the problem that she could present to Judge McBryde). (Id. at 2 n.2.) The order directed the Clerk to file, within ten days, a "document" providing: (a) information concerning the amount of interest that had been lost because of the failure to invest the $40,000; and (b) an explanation of why the money was not invested and how and when the failure to invest the money was discovered. (Id. at 4-5.)

Ms. Doherty was "stunned and bewildered" by what she perceived as the "hostile" tone of this order. (Doherty, TR: 794-96.) She consulted Chief Judge Buchmeyer, seeking his advice on how to respond to Judge McBryde's order and asking whether she should retain a lawyer. At Chief Judge Buchmeyer's suggestion, she prepared a letter, as to which he suggested changes, with exhibits providing the information requested by the March 30, 1995 order. The information provided in the letter was extremely detailed and included charts showing the possible amounts of interest based on length of deposit; the range of per-day interest based on different assumptions; and how the interest amounts were calculated. It also contained a statement explaining the procedures followed by the deputy clerk when the $40,000 was received and the reasons for the failure to place the money in an interest-bearing account, as well as a description of what occurred after the discovery of the error. Ms. Doherty testified that compiling this information was

a high priority and that, at her direction, her budget and financial officer did nothing other than work on compiling this information for several days.

The letter expressed surprise and "disappointment" that Judge McBryde had chosen to proceed in a formal manner, since the Clerk's office had acknowledged that a mistake had been made and was taking steps to rectify the problems. Nonetheless, the letter recognized the "obligation to respond to [Judge McBryde's] order" and proceeded to do so. (Id. at 1.) It explained that an investigation had determined that Ms. Miller had not been guilty of intentional or careless disregard of the Final Judgment. Ms. Doherty concluded by stating that she "would really like the opportunity to resolve this matter without further action on your part," noting that counsel for plaintiff preferred to proceed through the FTCA, and that she had been assured by the Administrative Office that every effort was being made to expedite the processing and payment of the claim. (Id.)

Judge McBryde's response to Ms. Doherty's April 7 letter was contained in his April 25, 1995 order, which criticized Ms. Doherty in extraordinarily harsh terms. The order stated that Ms. Doherty's letter "is so unprofessional and so disrespectful of the undersigned judge and the court, and manifests such a high level of insolence, that it borders on, if it does not constitute, contempt of court by one of its statutory officers." (Exh. 79, at 2) Judge McBryde proceeded to accuse Ms. Doherty, inter alia, of "a total disregard of the professionalism she should have in the conduct of her official duties," and of "lack of respect and understanding of the needs, powers and responsibilities of the court." (Id. at n.2) Most egregiously, he accused Ms. Doherty of "collaborating" with counsel for Grecia Torres in an effort to prejudice the minor's rights (id. at 3), stating that Ms. Doherty "had set upon a course of circumventing the investment requirements" of his order by "attempting to 'put in place' an administrative procedure for the minor plaintiff to pursue." (Id. at 2 n.2.)

This allegation was made three weeks after Judge McBryde had been told by the Administrative Office of the United States Courts that a tort claim was the only course allowed by law. Despite his reputation for thoroughness, Judge McBryde had

done no further research on the FTCA beyond his initial "preliminary inquiry" before issuing this order. In fact, had Judge McBryde researched this issue, he would have discovered that the Administrative Office was correct and that the FTCA was the only available remedy. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks, 960 F.2d 911 (10th Cir. 1992).

Judge McBryde concluded that he would — for the time being — refrain from imposing sanctions upon Ms. Doherty because "hopefully the clerk only had a lapse in her understanding of her role in the scheme of things; and this court would prefer to think that the order will be a sufficient reminder to her of what a clerk's role is, or, if not, should be." (Id.) He proceeded to order Ms. Doherty's April 7 letter stricken from the record and to direct that further responses to the questions posed in the March 30 order be provided. (Id. at 3-6)

Ms. Doherty received a copy of the April 25, 1995 order on April 26, 1995, while attending a meeting in Chief Judge Buchmeyer's conference room about implementing new security measures in the wake of the Oklahoma City bombing. Ms. Doherty was "devastated" by what she perceived as "a vicious attack on me personally and professionally." (Doherty, TR: 803-04.) Ms. Doherty became visibly upset and, after the meeting, showed the order to Chief Judge Buchmeyer in the presence of three other District Judges, whom Chief Judge Buchmeyer had asked to remain in the conference room when he noticed Ms. Doherty's appearance of extreme distress. Shortly thereafter, Judge Buchmeyer reassigned the Torres case from Judge McBryde to himself (id. at 807-08), a decision ultimately reversed in In re McBryde, 117 F.3d 208 (5th Cir. 1997).[28]

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[28] Since the decision in In re McBryde, 117 F.3d at 208, reassigning the Torres case to him, Judge McBryde has withdrawn the April 25 order, ostensibly on the ground that the Ms. Doherty's letter was written by Judge Buchmeyer. See Torres v. Trinity Industries, Inc., No. CA4-90-812-A, Order, at 3 (N.D. Tex. July 21, 1997). Judge McBryde's current beliefs as to the authorship of this letter are irrelevant to evaluating his conduct in April 1995, which must be based on his knowledge and beliefs at the time.

The extraordinarily harsh language used by the Judge toward Ms. Doherty in this matter makes it clear that Judge McBryde lacks a proper appreciation for the use and effect of the vast and extensive powers given to a federal judge. Ms. Doherty was then, and, as dramatically evidenced by her testimony before the Special Committee, remains today shaken by her treatment. She is a dedicated, efficient public servant who takes pride in her work and upon whom, along with others, the federal courts rely. Just as Judge McBryde's abusive conduct has had a negative effect on the morale of the U.S. Attorney's Office and the Public Defender's Office, we find that it has had a similar effect on the Clerk's Office.

16. Turner II (November 1996)

On July 17, 1992, Judge McBryde sentenced Patrick Leon Turner to fifty-seven months imprisonment for tax fraud.[29] In October 1992, Turner escaped from a federal prison in the Eastern District of Texas. He was subsequently apprehended and, on July 23, 1993, received a sentence of thirty months in connection with this escape to be served concurrently with the fifty-seven months sentence imposed by Judge McBryde.

Following his apprehension, Turner began cooperating with the government on several federal narcotics investigations in Oxford, Mississippi. As a result of this cooperation, William Martin, an AUSA in Oxford, contacted Tonda Curry and Richard Roper, AUSAs in Tyler and Fort Worth, respectively, to ask them to file motions to reduce Mr. Turner's sentence.[30] Martin noted, inter alia, that Turner had "risked his life" to provide useful information on a possible "murder-for-hire" and on several major drug traffickers and had provided critical testimony before a grand jury in Oxford. (Exh. C-52(H).)

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[29] In this proceeding, Turner was represented by Federal Public Defender Tim Henry, who, as noted in Part III.A.2, was accused by Judge McBryde of lying on behalf of Mr. Turner in connection with Turner's sentencing.

[30] Since the sentences in Fort Worth and Tyler were served concurrently, the actual time served by Mr. Turner would only be impacted if both sentences were reduced.

On July 22, 1994, AUSA Curry filed in the Eastern District of Texas a motion to reduce Mr. Turner's sentence pursuant to Fed. R. Crim. P. 35(b). Judge Justice held a hearing on August 30, 1994 and granted the motion, reducing the Eastern District sentence from thirty months to twelve months and noting his hope that the court in the Northern District of Texas would do likewise.[31]

In November 1994, AUSA Martin contacted AUSA Roper again to request that Roper file a motion for a sentence reduction on behalf of Turner. Martin noted that Turner had continued to supply "valuable and substantial assistance" concerning the whereabouts of a fugitive narcotics dealer. (Exh. C-45 (attachment).) Accordingly, in December 1994, AUSA Roper filed a Rule 35 motion with Judge McBryde which stated that Turner had provided information not known to him until more than one year after the imposition of his sentence (as required by Rule 35(b) under the circumstances). The correspondence from AUSA Martin was attached as an exhibit.

Shortly thereafter, Judge McBryde issued an order requesting additional affidavits establishing that the court was authorized to reduce Turner's sentence under Rule 35(b). AUSA Roper filed a response which attached an affidavit from Lynn Mead, a Special Agent of the Drug Enforcement Administration. This affidavit detailed Mr. Turner's cooperation and identified certain information provided by Mr. Turner which he acquired at least one year after his sentencing.[32] After receiving this response, Judge McBryde denied the motion to reduce Turner's sentence.

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[31] In the course of this hearing, Mr. Curry incorrectly indicated that the information provided by Mr. Turner had been acquired by him subsequent to his sentencing in July 1993.
This error was legally irrelevant, however, because AUSA Curry's motion had been filed within one year of sentencing, making it unnecessary under Rule 35(b) for the information to have been acquired subsequent to sentencing.

[32] In particular, in November 1994 (more than a year after sentencing), Turner was given a phone number by another inmate as a contact number for a fugitive. He passed this number along to authorities.

In April 1996, AUSA Martin wrote to AUSA Roper again and asked Roper to file a second Rule 35 motion on behalf of Turner. This letter explained that, in November 1995, a criminal defendant, Robert Armstrong (a/k/a Robert Collins) charged with various narcotics and firearms violations described his criminal activities to Mr. Turner, who then informed the government and became an important witness against Armstrong at a trial set for April 1996. Federal agents had Mr. Turner transported to Oxford, Mississippi in order to testify at Armstrong's trial. Armstrong had vigorously maintained his innocence up to this point. When Armstrong learned that Mr. Turner was cooperating with the government and was present in Oxford, he began inquiring about and eventually entered into a plea bargain. Armstrong received a sentence of 157 months and became an important cooperating witness himself. (Exh. C-56, Tab B.)

Accordingly, AUSA Roper filed a second Rule 35 motion for Mr. Turner and attached AUSA Martin's letter as an exhibit. Following the filing of this motion, Judge McBryde requested additional information from AUSA Roper, which was provided in several supplemental filings. Included among these filings were, inter alia, a handwritten letter (erroneously termed a "deposition" by Mr. Turner) from Mr. Turner to AUSA Martin describing his conversation with defendant Armstrong and the plea agreement executed by Armstrong.

On November 5, 1996, Judge McBryde issued a memorandum and order denying the second motion for a reduction of Mr. Turner's sentence. In reaching this conclusion, Judge McBryde noted that the government had not produced to him any "memo, report, notes, [or] other writings prepared by agents of the government" detailing Mr. Turner's cooperation in the Armstrong prosecution. The court went on to conclude that this absence of such written documentation suggested that AUSA Martin had "fabricated" his report of cooperation on the part of Turner:

> "If any such memo, report, etc., existed, the government was obligated to disclose it to the court in response to the directives of the September 11, 1996, order. Therefore, the court assumes that there is no such item and that the

> representations made to the court concerning 'new assistance' are less than candid, if not fabrications in whole or in part. The court is not inclined to give weight to the self-serving 'deposition' Turner scripted on January 26, 1996, for the benefit of AUSA Martin." (Exh. C-57, at 12-13.)

Judge McBryde made this damaging statement (which ultimately resulted in an investigation of Martin by the Office of Professional Responsibility ("OPR") of the Department of Justice[33]) without giving Martin any notice or opportunity to explain why he had no notes. Indeed, AUSA Martin had never appeared as counsel in any of the Turner proceedings before Judge McBryde. Judge McBryde also criticized the other two AUSAs involved in the Turner matter (AUSAs Roper and Curry) in terms that called into question their integrity.[34]

While the memorandum and order were placed under seal, Judge McBryde specifically stated that the sealing would not prevent the use of the document in connection with a governmental disciplinary proceeding, making it clear that Judge McBryde anticipated that the allegations contained in his memorandum and order would result in an OPR investigation of all three AUSAs. Indeed, AUSA Roper felt that he was obligated to report this incident to the OPR. OPR conducted an

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[33] As a general matter, AUSAs are obligated to report to the OPR when a federal judge accuses them of being untruthful or dishonest.

[34] He criticized AUSA Roper for "withholding information from the court" in his initial Rule 35 motion concerning the fact that Judge Justice had granted a sentence reduction in Tyler. (Exh. C-57, at 14.) He also wrote that AUSA Curry's statement to Judge Justice that Mr. Turner had acquired the information prior to sentencing "appears to have been blatantly false." (Id. at 15.)

At the hearing before the Special Committee, AUSA Roper explained that he had not provided additional details in his motion papers because, based on prior experience, he expected that Judge McBryde would hold a hearing on the motion during which these details would be disclosed. With respect to AUSA Curry's statement to Judge Justice, AUSA Roper explained that it was irrelevant when Mr. Turner acquired the information at issue because, in the case of the motion filed by AUSA Curry, the motion was filed less than one year after sentencing.

investigation and, unlike Judge McBryde, gave the attorneys involved an opportunity to explain themselves. After its investigation, the OPR cleared AUSAs Martin, Curry, and Roper of any wrongdoing or ethical violations.

Nevertheless, the experience was deeply upsetting to those involved, particularly AUSA Martin about whom the charges of fabrication were made. AUSA Martin eventually asked AUSA Roper to speak with his wife about this incident. AUSA Gartner spoke with Martin at length on several occasions and described him as "distraught" over the Turner incident. According to Gartner, Martin or the U.S. Attorney in Mississippi indicated to him that Martin had hardly eaten anything or slept for several days as a result of the order issued by Judge McBryde.

17. Burgos Trial

Michael Heiskell graduated from law school in 1974, served as an Assistant District Attorney in Galveston County for five years and as an Assistant U.S. Attorney in Dallas for four years. He has been in private practice in Fort Worth since 1984, specializing in criminal defense work, is Vice President of the Texas Criminal Defense Lawyers Association and on the Board of the Tarrant County Criminal Defense Lawyers Association.

In November 1996, Heiskell represented Dr. H. Burgos in a trial before Judge McBryde. Burgos, 70 years old and in poor health at the time of the trial, was charged with submitting false bills to insurance companies. Burgos faced a possible sentence of eight to ten years.

On November 5, 1996, Election Day and the second day of the trial, Heiskell had six or seven witnesses, in addition to Dr. Burgos, standing by ready to testify. The witnesses included a doctor and a local police chief. Heiskell's trial strategy from the outset was to call the other witnesses, all expected to be short witnesses, first and to have Dr. Burgos testify at the end of the defense case. That way, under Heiskell's trial plan, the jury would hear reputation testimony about Dr. Burgos, expert testimony regarding medical billing practices and certain other factual information; then, Dr. Burgos, the most important witness, would testify as both a fact witness and summary witness and the jury would hear his denial of the allegations last

before deliberations. Heiskell had discussed this strategy with his staff, and with Dr. Burgos and Mrs. Burgos.

Over the noon hour, Heiskell asked the Assistant U.S. Attorney, Ron Eddins, how long the government's case would take. Eddins indicated he would present evidence until 6:00 or 6:30 p.m. and might not be able to complete his case by that time. Heiskell's witnesses had wanted to know when they would testify. The doctor had patients to attend to, others were concerned about going to vote and getting home before dark and the police chief had professional obligations. In light of Eddins' schedule, Heiskell released these witnesses at noon or shortly after, telling them to report back to court Wednesday morning.

Somewhere between 3:45 and 4:00 PM, the Court asked Eddins if he would finish "about 6:00 or so". Eddins answered, "I don't think we can". Nevertheless, the Court directed Mr. Heiskell to "have one or two witnesses ready in case we do get there". In response, Heiskell had his investigator and paralegal contact the witnesses released earlier. As it turned out, the doctor was seeing a patient, and the other witnesses could not be located.

At about 6:00 p.m., the government completed its case, and the following occurred:

> "MR. HEISKELL: Judge, can I start in the morning?
>
> THE COURT: Do what?
>
> MR. HEISKELL: Can I start in the morning, Judge?
>
> THE COURT: No. Let's move on. I've got that other case coming. Let's move on. Move on." (Exhibit C-124, at 630.)

Heiskell described the Court's demeanor during this exchange as "very stern." (Heiskell, TR: 1348.)

Heiskell complied with the instruction to "move on" and called Mrs. Burgos to the stand. During her direct examination, Heiskell was under time pressure from the Court. The examination of Mrs. Burgos ended around 6:15 p.m. at which time the following took place:

> "MR. HEISKELL: Your Honor, may we approach for a minute, please?
>
> THE COURT: Yes.
>
> (Bench conference with Mr. Eddins and Mr. Heiskell:)

MR. HEISKELL: The only other witness I have, Your Honor, is the doctor. And I have about five witnesses, short witnesses, tomorrow before I call him. And I would like to call him at the end, Your Honor, because —

THE COURT: Go ahead and call them now.

MR. HEISKELL: I'm sorry, Judge, they're not here.

THE COURT: Well, you'll have to put him on if you want to use him as a witness.

(End of bench conference.)" (Exhibit C-124, at 649-50.)

Heiskell was cut off before he could explain to the Court why he wanted to call Burgos at the end. When asked in proceedings before the Committee why he did not go back and urge his position on the Court more vigorously, Heiskell stated:

"Well, again, as I stated earlier, I didn't want to incur the wrath of the court in front of a jury. I'm very mindful that, in being very assertive and vigorous with the court, the court will be very short and stern and reprimand you in front of the jury in such a fashion that not only is it embarrassing to counsel, but it's not helpful, in my opinion, to my client when they see the court acting such a way toward the defendant and his counsel." (Heiskell, TR: 1352)

Thus the Court required Heiskell, at 6:15 p.m., to scrap his trial strategy and call to the stand the 70 year old Burgos, who was by that time in the trial day "exhausted."

After two pages of background questioning of Burgos, the Court interrupted and asked, "how long do you think your questioning of this witness will take". This question was asked about the defendant in the case, who faced eight to ten years in prison and whom the Court had just required to take the stand.

After another seven pages of testimony (approximately 15 minutes after Dr. Burgos took the stand), the Court called Heiskell to the bench, confirmed that the defense had five other witnesses, and then stated: "Well, we can't get all that done tonight, so why don't we take a recess and come back in the morning. How long do you think those will take? Are they real short?" (Heiskell, TR: 1354.) After this exchange, the jury was

sent out for the day at 6:30 p.m. The reason the Court gave for adjourning was that, with several other witnesses to be heard, "we can't get all that done tonight." Yet the fact that there were several witnesses who had to testify and thus that the trial could not be completed that night was the very information Heiskell had provided before the Court forced him to call Burgos to the stand, out of order, for 15 minutes of testimony.[35]

The Committee finds this incident of concern for two reasons. First, Mr. Heiskell, an experienced and respected defense lawyer, made the judgment that, after being cut off by the Court, he could not risk going back to explain his reason for wanting to call Burgos last. He decided that the potential harm to his client of counsel being reprimanded in front of the jury was too great.

Second, the Court, without letting counsel explain why, overrode Heiskell's request to call the defendant last. No discernible objective was achieved by this action. The Court was aware the proceeding, with a number of additional witnesses to testify, could not be completed that evening. And in fact, the proceeding was recessed after 15 minutes of additional testimony.

18. Burgos Sentencing (January 1997)

In November 1996, Dr. Hernan Enrique Burgos was tried and convicted of mail fraud in a trial before Judge McBryde. Sentencing for Dr. Burgos was set for January 31, 1997 at 9:30 AM. Ten days prior to the sentencing, Arch McColl replaced Michael Heiskell as Dr. Burgos' attorney.

On January 28, 1997, a telephone conference was held during which Mr. McColl informed Judge McBryde that he planned to file a motion for a continuance of sentencing based upon the serious medical condition of Dr. Burgos, in particular his need for hernia and prostate surgery. The following day, Mr. McColl filed a motion for a continuance, which he supplemented on January 30, 1997.

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[35] Heiskell did not ask, when the trial resumed the next morning, to break in on Burgos' testimony to permit the other witnesses to testify because he decided it would "upset the flow of how the jury was receiving the evidence." (Heiskell, TR: 1356.)

Mr. McColl received no word on the motion for a continuance until approximately 4:50 PM on January 30. At that time, Judge McBryde's chamber informed Mr. McColl that a hearing would be held the next morning at 9:00 AM to consider his motion for a continuance. Only live testimony would be considered at this hearing.

Since the motion for a continuance was based upon Dr. Burgos' medical condition, Mr. McColl immediately endeavored to locate a physician who could testify on Dr. Burgos' behalf concerning the need for hernia and prostate surgery. The general surgeon, Dr. Busch, told McColl that he would be available by telephone the next morning between 9:00 AM and 9:30 AM, but that he could not appear in court as he had a presentation to give in Houston that morning.

Accordingly, at 8:30 AM on the morning of the hearing, McColl filed an emergency motion for a telephone conference between 9:00 AM and 9:30 AM.

McColl then proceeded to Judge McBryde's courtroom for the scheduled hearing. Judge McBryde began by calling several other matters. At 9:16 AM, when the court completed one of these matters, Mr. McColl addressed the court:

> "THE COURT: Okay. Let's go back to the cases set for arraignment.
>
> MR. McCOLL: Excuse me, Your Honor. Arch McColl for Dr. Burgos.
>
> THE COURT: You may be seated, Mr. McColl. I'm in the process of handling other cases. Would you please be seated.
>
> MR. McCOLL: I just wanted to inquire of the Court --
>
> THE COURT: Pardon me, Mr. McColl. Be seated while I proceed with other cases, and when I reach your case I will call you.
>
> MR. McCOLL: But it's an emergency, Your Honor.
>
> THE COURT: Pardon me. What is the emergency?
>
> MR. McCOLL: The emergency is that a doctor who is available to the Court to give medical information about the pending motion has made himself available from 9:00 to 9:30 because he could not, on such short notice, be here.

So I filed a motion this morning, Your Honor, detailing all this. And you may not have seen the motion, Your Honor.

THE COURT: Okay. You may be seated while I proceed with the other matters before the court.

MR. McCOLL: Thank you, Your Honor." (Exh. C-85, at 3-4.)

Judge McBryde then proceeded with another matter for several minutes more. At the end of this matter, Mr. McColl stood up again and attempted to explain the situation. Judge McBryde responded by having the bailiff escort Mr. McColl out of the courtroom:

"THE COURT: The next case I'm again calling for arraignment is No. 4:96-CR-066-A.

MR. McCOLL: Excuse me, Your Honor.

THE COURT: United States of America —

MR. McCOLL: I have to —

THE COURT: If you continue to interrupt me, I'm going to have to take some action, so would you please be seated so I can go forward with the matters that I have scheduled to be dealt with.

MR. McCOLL: Yes, sir, but I have to ask this.

THE COURT: Pardon me, sir. Please be seated.

MR. McCOLL: I have to ask this.

THE COURT: Would you please take him out in the hallway while I continue on with other matters that need to be dealt with before the court.

MR. McCOLL: I would like to ask —

THE COURT: You're being taken into the hallway until I conclude other matters and call your matter.

(Mr. McColl leaves courtroom.)" (Exh. C-85, at 6-7.)

Mr. McColl testified that he was "absolutely stunned" by Judge McBryde's order. (McColl, TR: 844.)

Following this incident, Judge McBryde proceeded with another arraignment. When he eventually turned to the Burgos matter, Judge McBryde questioned Mr. McColl at length concerning why he did not subpoena Dr. Busch to appear in court that morning:

"THE COURT: Mr. McColl, did you try to subpoena him to cause him to be here?

MR. McCOLL: Your Honor, I got the order from the Court at ten minutes until 5:00.

THE COURT: Listen to my question, Mr. McColl. Did you try to subpoena the doctor to cause him to be here today?

MR. McCOLL: You mean through the clerk's office in Fort Worth?

THE COURT: Did you try —

MR. McCOLL: I don't understand your question, Your Honor.

THE COURT: Do you know what a subpoena is, Mr. McColl?

MR. McCOLL: From a Fort Worth district clerk?

THE COURT: Do you know what a subpoena is that requires a person to appear at a hearing to give testimony?

MR. McCOLL: As I understand it —

THE COURT: And did you try to subpoena the doctor you're now referring to, to be in attendance at this hearing?

MR. McCOLL: Well, as I understand it, it was impossible —

THE COURT: Can you answer that question, Mr. McColl?

MR. McCOLL: In ten minutes, I could not go to Fort Worth to get a subpoena.

THE COURT: Listen real close, Mr. McColl, to my question and just answer my question. Did you try to subpoena this witness, the doctor you're referring to, to be present this morning to give testimony?

MR. McCOLL: Because I thought that would be absolutely impossible, I tried to get him here by telephone.

THE COURT: Did you try to subpoena him, Mr. McColl, to be here this morning?

MR. McCOLL: I concluded as an officer of the court that that would be a fruitless and vain act . . . ." (Exh. C-85, at 13-15.)

Mr. McColl interpreted Judge McBryde's questions concerning whether he knew what a subpoena was as "sarcastic."

In the end, Judge McBryde agreed to assume that Dr. Busch would testify that it was urgent for Dr. Burgos to have

hernia surgery. Nevertheless, Mr. McColl testified that he felt that his treatment during the January 30 hearing was "humiliating" and "demeaning."

19. Lonnie Woods Sanction (June 1997 to present)

The Special Committee heard testimony regarding a very recent episode in which Judge McBryde held an attorney, Lonnie Woods, in contempt and then, after an appeal was filed, he withdrew the contempt order and directed that Woods be prosecuted for contempt and possible ethical transgressions, implying that should Woods testify in his own defense at the rescheduled hearing he would be subject to an additional perjury charge.

Mr. Lonnie Woods was representing Mr. Hubbard in a plea hearing before Judge McBryde on June 13, 1997. An issue arose as to the voluntariness of Mr. Hubbard's plea, and Judge McBryde decided to bring in another lawyer to counsel Mr. Hubbard on that issue. In order to have another attorney meet with Mr. Hubbard, Judge McBryde recessed the hearing. The transcript reflects the following:

> "THE COURT: I'm thinking about the possibility of appointing another lawyer just to confer with him and Mr. Woods, and then to confer with him out of the presence of Mr. Woods, on the issue of the voluntariness of his plea. And to do that soon, because we're going to try to —
>
> Well, okay. I'm going to get another lawyer. He'll be taken back downstairs. You stay downstairs, Mr. Woods. I'm going to get another lawyer as soon as I can get one over here to confer with your client and then to discuss the matter with you, and then we'll be back up here at 12:30.[36]
>
> MR. WOODS: 12:30.
>
> THE COURT: We've got other things so we're going to have a close schedule, but I'll get another lawyer up here and talk to you.

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[36]The Special Committee listened to the audio tape of the proceedings and reviewed the relevant portions of the transcript. Although the written transcript indicates that there is a comma after the word "downstairs," on the audio tape from which the transcript was prepared there is a noticeable pause after the word "downstairs."

Mr. Hubbard, I'm going to get another lawyer up here that I'm going to appoint for you for the limited purpose now of being sure that you really want to enter a plea of guilty and that you're not entering a plea of guilty just because you don't have confidence in Mr. Woods or you don't like the way he's treated you or something like that. You be candid with that lawyer. You be honest with him and tell him everything he wants to know. Then I'm going to have all of you come back here at 12:30 and we're going to talk about where we go from there." (Exh. C-114, at 30-31.)

Although the hearing resumed on time, Judge McBryde, sua sponte, decided to conduct a contempt hearing in order to determine whether he should hold Mr. Woods in contempt for failing to wait downstairs for the other attorney to arrive. Mr. Woods explained that he did not understand that Judge McBryde had ordered him to wait downstairs:

"Before he's taken down, I want to explore a little bit further about what happened during the noon hour.

Mr. Couch, about what time did you arrive at the courthouse?

MR. COUCH: I believe it was about quarter to 12:00. No, I'm sorry, about 11:30.

THE COURT: And when did Mr. Woods arrive?

MR. COUCH: About 15 minutes later.

THE COURT: Okay. Fifteen minutes after you arrived or after you had completed your conversation with the defendant.

MR. COUCH: Probably 15 minutes after I had completed my conversation with Mr. Hubbard.

THE COURT: How long after you arrived was it that Mr. Woods arrived.

MR. COUCH: I would say 25 minutes.

THE COURT: Okay. About what time are you talking about?

MR. COUCH: I would say about 12:10, possibly.

THE COURT: Okay. You can be seated.

Mr. Woods, tell me again why you didn't stay here at the courthouse.

MR. WOODS: First of all, Your Honor, as I had said, I didn't understand the stipulation that I remain. Otherwise, I would have no problem with that. Just before we adjourned, I asked you if 12:30 we reconvene. I was asking that for clarity in my mind that that's when I was due back here.

When I left here, I had two courts to check by. I did go by the 372nd and filed a motion for continuance. I did check by the 231st where I was scheduled for trial this morning at 9:00 o'clock to inform the judge that I was in this hearing, even though I did call. And as soon as I did that, I went to my office at that time and received a phone call and came right back.

THE COURT: Let me back up. Mr. Woods, I think in fairness to you I'm considering holding you in contempt of court for failure to comply with my order, and we're having a hearing now on that possibility. So you back up and start over again and say anything you want to say, bearing that in mind. We're having a hearing to determine whether I hold you in contempt of court for violating my specific direction that you stay downstairs with Mr. Woods (sic).

Okay, go ahead. You can incorporate what you've already said if you would like.

MR. WOODS: I would say the same, that I didn't understand the direction. To me I felt you were informing the defendant that he was to remain with the U.S. Marshall until we reconvened at 12:30. Had I understood that, I would have asked if it was okay for me to leave to at least check with the two courts, which I was due to report.

THE COURT: Okay. Do you have anything else you want to say on the subject we're now having a hearing?

You can be seated, Mr. Hubbard.

MR. WOODS: That's all the information I have, Judge." (C-114, at 48-50.)[37]

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[37]Mr. Woods did not have the benefit of the transcript or a tape recorder to play back Judge McBryde's oral directive, but could only rely on what he heard Judge McBryde say at the time, stated a single time at the end

Judge McBryde refused to accept Mr. Woods' explanation, and the following colloquy ensued:

> THE COURT: Okay. Do you have anything else?
>
> MR. WOODS: No, sir.
>
> THE COURT: Okay. I hold you in contempt of court for violating my directive that you stay downstairs while we had another attorney come up here. I'm fining you $500. I'm ordering that that be paid to the United States District Clerk before the end of the day.
>
> I'm also ordering that you will reimburse the government for any fees that Mr. Couch collects by virtue of having been required to represent your client.
>
> MR. WOODS: May I inquire as to you're making that finding?
>
> THE COURT: Pardon?
>
> MR. WOODS: May I inquire as to why your making that finding?
>
> THE COURT: What finding?
>
> MR. WOODS: Of contempt.
>
> THE COURT: Because you consciously violated an order of mine that you stay downstairs while we were resolving the issue of whether your client wanted to enter a plea of guilty and the other things that we're talking about.
>
> MR. WOODS: So it is your belief that I heard you —
>
> THE COURT: I'm not going to be subjected to your cross-examination, Mr. Woods.
>
> MR. WOODS: I just wanted to ask, Your Honor. I'm just asking a question.

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of the hearing. While it seems plain from reading the transcript that Judge McBryde had directed Mr. Woods to remain downstairs, a review of the audiotape indicates to the Special Committee that one could argue that Judge McBryde's order was ambiguous. We do not decide here whether Mr. Woods was in fact ordered to wait downstairs. We also do not decide here whether, if this was what the order entailed, Mr. Woods did or did not understand this order. Even if the order was unmistakably clear, we find Judge McBryde's subsequent treatment of Mr. Woods unconscionable under the circumstances.

THE COURT: You consciously violated my order is my finding.

MR. WOODS: So you believe that I heard you.

THE COURT: And I'm more satisfied of that when you tell me there was another person in the court who heard my order and you discussed with him what I said, apparently.

MR. WOODS: I just said I had to be back —

THE COURT: And it's just incomprehensible to me that neither one of you would have understood what I said. So I believe you're not telling me the truth, in addition to violating the order.

MR. WOODS: One more thing, Your Honor. Since we're having a hearing, is it possible for me to request a transcript of whether or not my name was called specifically in that direction? Is that a fair request?

THE COURT: Yes, and it will be marked Exhibit A to the hearing. It will be a court's exhibit. I'll call it Court's Exhibit 1.

MR. WOODS: Do you understand my request? That prior to the adjournment when you were making the direction to remain until 12:30 that you called my name out.

THE COURT: Did it not sound to you like I did?

MR. WOODS: That is correct.

THE COURT: When I said, "You remain here," you didn't think — Or when I said, "You stay downstairs," you didn't think I called your name?

MR. WOODS: No, sir." (Exh. C-114, at 52-54.)

Mr. Woods filed a notice of appeal on June 23, 1997. Two days later, Judge McBryde issued an order setting aside his previous contempt order, but directing that another hearing be held on the contempt matter and also to determine whether other disciplinary action under the Local Criminal Rules should be taken against Mr. Woods. Judge McBryde directed that the U.S. Attorney's Office be brought in to prosecute Mr. Woods with respect to these matters.[38] The reason provided by Judge

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[38] Mr. Roper, the AUSA assigned to prosecute the matter, was not

McBryde for setting aside the contempt order was that "[a]n argument might reasonably be made that the undersigned judge served as a prosecutor, as well as the judge, in the matter of determining whether Woods was guilty of contempt." (Exh. C-117.)

Judge McBryde's order went on to state that at the hearing he would consider Mr. Woods' conduct in failing to stay downstairs, as well as the testimony Mr. Woods had previously given in explaining his position. In addition, Judge McBryde went on to state that he would take into account any future testimony Mr. Woods might give at the hearing to consider the charges of contempt and violations of the local criminal rules. In addition to whatever sanctions Judge McBryde might deem appropriate with respect to the contempt charge, a finding that Mr. Woods violated the local criminal rules exposed him to disbarment.

Mr. Heiskell, who is defending Mr. Woods in this matter, testified before the Special Committee and explained that he interpreted Judge McBryde's statement that he would consider any testimony Mr. Woods might give in his defense as a threat that Judge McBryde would find Mr. Woods guilty of perjury if he so testified. Judge McBryde had already found that Mr. Woods' statement that he did not understand that Judge McBryde ordered him to wait downstairs was untruthful.

> "What I read from that statement is since the court had already prejudged, if you will, his credibility or judged his credibility and found him to be untruthful, that any testimony that he would give would again have Mr. Woods in that crossfire of the court regarding his incredibility, if you will, of testimony. It would subject Mr. Woods not only to further orders of contempt, potentially, but also a potential referral to the U.S. Attorney or grand jury as a perjurer. So I was looking at it from that standpoint of the predicament Mr. Woods was in by giving any further testimony, the chilling effect it would have on him." (Heiskell, TR: 1370.)

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enthused about it and conveyed that to Mr. Heiskell. At the hearing on the matter, Mr. Roper simply introduced the transcript and then rested.

As a consequence of this concern, Mr. Heiskell decided not to call Mr. Woods to testify at the contempt hearing.

On behalf of Mr. Woods, Mr. Heiskell moved to disqualify Judge McBryde, arguing that:

> "In the Court's order to set aside the June 25, 1997 [order], two days after Woods appealed the original contempt order, the Court also took the extraordinary step of scheduling a disciplinary hearing against Woods, at the same time, based on testimony Woods has given or will give at said hearing, as well as his alleged failure to obey the command of the Court. This once again raises the specter of the Court's impartiality as to how it can fairly and reasonably view Woods' testimony at the scheduled hearing. It also serves as a chilling effect on Woods' potential testimony." (Exhibit C-118, at 3.)

Judge McBryde denied the motion for disqualification, and conducted a hearing on July 10, 1997. Mr. Woods did not testify at the hearing. The matter is still pending.

Judge McBryde objected to the Committee's even hearing evidence on this matter because it was sub judice before him. The Committee does not purport to decide whether, in fact, Mr. Woods was in contempt of court for failing to remain downstairs at the Fort Worth courthouse. Instead, the Committee considers this incident as part of a pattern on Judge McBryde's part of overreacting to perceived slights and infractions and of commencing unduly complicated and disruptive procedures to investigate apparently innocuous events. Here, the alleged infraction, even if proven, seems quite minor and does not appear to have inconvenienced the court in any way. Nevertheless, an attorney was subjected to serious charges of misconduct and he was forced to hire an attorney. The U.S. Attorney was ordered to prosecute this attorney and the attorney was threatened with an additional charge of perjury if he testified on his own behalf. These developments seem entirely out of proportion with the underlying alleged infraction and suggest a failure on the part of Judge McBryde to exercise restraint in the application of his judicial power.

Counsel for Judge McBryde declined to cross-examine Mr. Heiskell on this matter. Nevertheless, Judge McBryde did

attempt indirectly to justify his conduct by offering the testimony of John Vasquez. Mr. Vasquez, an investigator for the Texas State Bar, testified that the Texas State Bar had questioned Mr. Woods' integrity in a number of unrelated matters and had sanctioned him on several occasions. We do not consider this testimony a defense for Judge McBryde's conduct, particularly since there is no evidence that Judge McBryde was even aware of the list of Mr. Woods' ethical transgressions (as testified to by Mr. Vasquez) at the time of the above described incident. Even if he did, Mr. Woods' behavior in other matters would not justify Judge McBryde's treatment of him in this matter.

20. Relations and Interactions with Northern District Judges

(a) "Be Patient" Incident (December 1994)

Judge McBryde's interactions with his fellow judges in the Northern District of Texas have been strained to say the least. An incident in December of 1994 exemplifies the troubling status of Judge McBryde's relationship with Judge Terry Means in particular.

There was a meeting of the judges of the Northern District of Texas in Dallas. Judge Woodward, Judge Mahon, Judge Means and Judge McBryde decided to travel from Fort Worth to Dallas together in Judge McBryde's Range Rover. Judge Means and Judge Mahon were in the backseat of the vehicle; Judge Woodward was in the front passenger seat, and Judge McBryde was driving. Judge Mahon and Judge Means both described engaging in playful banter with one another on the drive from Dallas to Fort Worth.

When the judges approached the Dallas courthouse, Judge McBryde elected to take a well-known shortcut through an adjacent parking lot. Judge McBryde began to proceed through the parking lot, but was forced to stop behind a car that was discharging passengers. Rather than waiting for the car to clear, Judge McBryde began to pull around the car. This prompted Judge Means, who was concerned about the safety of the passengers who were exiting the car, to say to Judge McBryde something to the effect of: "John, now, let's be patient here. I

know that's not a virtue you've cultivated, but let's be patient here." (Means, TR: 691.)

When they reached the courthouse, Judge McBryde approached Judge Means, out of earshot of Judges Mahon and Woodward. Judge Means recounted Judge McBryde's comments as follows:

> "He said, 'Terry, I don't appreciate that comment about patience and virtue. I don't need that kind of crap out of you.
>
> I was stunned and I said, 'Well, John, I was just teasing,' and he said, 'It doesn't matter if you are teasing or not. I don't need that kind of crap out of you.'" (Means, TR, 692.)

Judge Means testified that Judge McBryde's demeanor was harsh and angry and his face was flushed during this exchange. In his testimony before the Special Committee, Judge McBryde did not dispute that Judge Means had made some comment about Judge McBryde's lack of patience; that he knew it was made in a "bantering way;" and that he had taken offense to it and told Judge Means so. Judge McBryde disagreed, however, with Judge Means' characterization of his reaction.[39] Judge Mahon testified that, although he did not hear what Judge McBryde said to Judge Means, immediately after the incident Judge Means recounted to him Judge McBryde's comments in terms essentially identical to those quoted above.[40] The Committee credits Judge Means' testimony concerning this incident as it is consistent with what he told Judge Mahon at the time.

Although the incident appears minor, both Judge Means and Judge McBryde indicated to the Committee that it was the

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[39] According to Judge McBryde, he said: "Terry, I don't appreciate your remark about my lack of patience." (McBryde, TR, 1044.) He denied using the word "crap" and testified that Judge Means responded to him by saying: "Judge, you need to get your head straightened out." (Id. at 1045.)

[40] According to Judge Mahon, Judge Means quoted Judge McBryde as follows: "I'm not going to put up with stuff like that. I'm not going to hear any more of that kind of crap." (Mahon, TR, 752.)

initial source of the ongoing bad will between the two. Not only did Judge Means' "bantering" comment offend Judge McBryde at the time, but it festered during the ensuing months and years.

(b) "Despicable" Incident (March 1997)

Judge Mahon recounted a recent incident reflecting Judge McBryde's strained relations with his fellow judges. In March 1997, the Fort Worth judges held a meeting to discuss security issues at the courthouse. Judge Mahon thought that convening the judges on a regular basis would be a good idea, so at the end of the meeting he suggested that the judges consider having lunch together occasionally to discuss issues of mutual concern or interest. Judge Mahon's suggestion prompted an angry attack by Judge McBryde. As Judge Mahon testified:

"Q: What happened?

A. Well, Judge McBryde said, 'I can't believe that you would be bringing up something like this, making such a suggestion, in view of the way y'all have talked about me as a judge.'

Q: Who was he talking to?

A: Well, I was the only one that had been talking, but he did say, 'Well, the way y'all have been talking about me as a judge.' He turned and looked at Judge Means and said, 'You are despicable.' Then he turned to me and said. 'You, too, are despicable. Both of you are despicable.'

He was standing up and I could tell he was very agitated and I began to try to soothe things. I said, 'John, I didn't mean anything personal by this. I was just suggesting that maybe it would be helpful for us sometimes to have open discussions about some of these matters." (Mahon, TR: 757.)

Judge McBryde disputed that he turned to Judge Means and Judge Mahon separately and called each one (and then both) "despicable," although he admitted calling both Judge Means and Judge Mahon despicable together. Judge McBryde testified that this reaction was the result of a number of factors, including that Judge Mahon had supported Judge Buchmeyer's decision in May 1995 to reassign the Satz and Torres cases from Judge McBryde to himself; that Judge Mahon had provided informa-

tion detrimental to Judge McBryde to counsel for the Special Committee; and that Judge Means had written a highly critical letter concerning Judge McBryde, which Judge McBryde believed completely unjustified and to which Judge McBryde believed Judge Mahon had contributed. Judge McBryde indicated that he thought his lashing out at Judges Means and Mahon was warranted under the circumstances, although he said he regrets having called Judge Mahon "despicable."

Judge Mahon made an effort, through his proposal for lunch, to take a constructive step to improve the seriously deteriorated relationship between Judge McBryde and the other Fort Worth judges. Judge McBryde's conduct in response to Judge Mahon's effort is of great concern because it indicates not only a rejection of Mahon's effort, but a person whose reactions are out-of-control.

(c) Other Interactions

In addition to the "Be Patient" incident and the "Despicable" incident specifically, the Special Committee is disheartened by Judge McBryde's relations and interactions with his fellow judges. The Special Committee heard testimony from two senior judges in the Northern District of Texas, Judge Eldon Mahon and Judge Barefoot Sanders, and Judge Terry Means that each received numerous complaints about Judge McBryde's conduct on the bench from a wide array of lawyers. Both Judge Mahon and Judge Sanders attempted to talk with Judge McBryde privately about his conduct and their concerns, but both were met with rejection.

In their own fashions, Judges Mahon, Sanders and Means all testified that Judge McBryde lacked judicial temperament. Judge Mahon testified that he told Judge McBryde that he should "lighten up." (Mahon, TR: 748.) Judge Sanders testified that Judge McBryde suffered from a "severe case of judgitis" (Sanders, TR: 763) and that he "intimidates people." (Id. at 767.) Judge Means submitted a letter to Chief Judge Politz which directly stated that Judge McBryde lacked judicial temperament.

The Special Committee also heard evidence regarding conflicts between Judge McBryde and Judge Means over administrative matters in the Fort Worth courthouse. Judge

Means expressed concern about Judge McBryde closing the Fort Worth courthouse on several occasions without consultation and Judge McBryde's rejection of a courthouse closing protocol that Judge Means had developed with the other judges.[41] There was also testimony regarding difficulties between the judges during 1995 construction work at the courthouse. Apparently, during the Winter and Spring of 1995, substantial construction work was under way in the courthouse, such that, at various times, the courtrooms of Judges Means and McBryde were either entirely unavailable or in serious disrepair. At one point in this period, Judge McBryde ended up taking the courtrooms of both Judge Means and Judge Mahon (the only major courtrooms available),[42] with the result that Judge Means was forced to conduct a number of arraignments and take a number of guilty pleas in the smaller bankruptcy courtroom. An exchange during these proceedings between a member of the Special Committee and Judge McBryde reveals that with respect to use of courtrooms, Judge McBryde was not always solicitous of his fellow judges' needs or feelings:

> "JUDGE BARBOUR: Have you ever started another case while a jury is deliberating?
>
> THE WITNESS: I do it often.
>
> JUDGE BARBOUR: Do you not use your own courtroom for both cases?
>
> THE WITNESS: Yes. I would not have in this case.
>
> JUDGE BARBOUR: Why?
>
> THE WITNESS: Because I had six defendants and the prosecutor. My courtroom and his courtroom were set up with two tables. We had, I think, six extra tables that we had set up in the courtroom.

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[41] As to courthouse closings, Judge McBryde testified that in one case, he thought Judge Means had left for the day, and in another case, he thought the Clerk's office would check with the other judges.

[42] According to Judge McBryde, his own courtroom was unusable at the time because of the extensive renovations that were under way. GSA employees called by Judge McBryde supported this testimony.

JUDGE BARBOUR: Why couldn't you have used that setup, left it like it was and tried the second case in there?

THE WITNESS: I guess it's conceivable that I could. It did not seem practical when I would have to be bringing people back into that courtroom during the day.

JUDGE BARBOUR: That's what I'm talking about. Why didn't you try the second case in Judge Means' courtroom where you were trying the first case? You were going to have to stop the proceedings in the second case, anyway, to move to the first case.

THE WITNESS: I guess you might have a point. I could have, but it did not seem to be practical to try a one-defendant case where I had a courtroom set up with tables for a six-defendant case, but I guess that's possible. Nobody suggested that. Had Judge Means suggested that, I might have considered that possibility." (McBryde, TR: 2102.)

B. Trial Practices

In addition to the individual incidents described above, the Special Committee found equally troubling testimony regarding the manner in which Judge McBryde conducts trials. The combination of Judge McBryde's trial practice rules and their often harsh application impedes the ability of many attorneys to try their case effectively and also creates a chilling and stressful environment.

1. Judge McBryde's Rules

Judge McBryde has a number of trial practice rules which govern the conduct of trials in his court. One rule is the requirement that the parties enter into a stipulation with respect to each and every uncontested fact in the case. Typically, these stipulated facts are read seriatim to the jury at the beginning of the case and may not be referred to again later in the proceeding. These facts are not connected to one another when presented to the jury, but are simply recited to the jury at the outset of the case. In some instances, this procedure takes a considerable length of time. For example, in the Coleman v. City of Grapevine case concerning which the Special Committee heard evidence, the recitation of the stipulated facts required thirty-eight pages of the trial transcript. In Taylor v. Charter Medical

Corp., the recitation required eighteen pages of the trial transcript. Often, such a recitation involves numerous facts, ranging from the mundane and trivial to the important.

As noted, Judge McBryde couples the procedure of reading the stipulated facts to the jury with a prohibition against alluding to any of the stipulated facts or eliciting testimony that touches upon any stipulated fact during the trial. Thus, in order to abide by Judge McBryde's rule in this regard, lawyers while questioning witnesses are required to be cognizant at all times of which facts are part of the stipulation and which are not. Lawyers are also forbidden under the rules to provide context for their questions or for facts they consider important.

Another rule governing trial practice in Judge McBryde's court is the prohibition against asking questions on cross-examination similar to questions asked of the witness on direct examination in order to test the testimony of the witness or to lay a foundation for impeachment. Judge McBryde views such questions as "repetitious" or "argumentative" and seeks to curtail the examination if he believes the questioner has repeated or is about to repeat a question in a different way. This rule is applied even to key witnesses. The following excerpt from the Mizell trial in which the defense attorney is attempting to impeach the government's main witness against his client by bringing out that the witness was receiving a reduced sentence in return for his testimony is indicative of the rule as applied by Judge McBryde

> "Q. And you understood that [a gun count adds five years to your sentence] when you were negotiating with the government, when you were telling these stories to the government, did you not sir?
>
> A. I'm sorry?
>
> Q. You understood —
>
> THE COURT: Mr. McCown, let's don't repeat the question. Let's go to another question.
>
> MR. McCOWN: Sir, he has not answered that.
>
> THE COURT: I think he has answered that adequately. Go on to another question.
>
> Q. Did you understand my question, Mr. Turnage?

THE COURT: He has answered your question. Go to another question." (Exhibit C-26, Vol. II, at 85: 10-23.)

Furthermore, an attorney may not set up the background for a question by summarizing prior testimony, either as a precursor for impeaching a witness or simply as a way of refreshing the recollections of the witness and the jury.

In addition, the Committee heard numerous witnesses testify that Judge McBryde's trials are extremely fast. Judge McBryde ordinarily permits only five minutes for opening statements. He often applies a highly technical application of the cumulative evidence rule, barring the admission of documentary evidence and oral evidence on the same matter. He rarely permits the use of demonstrative exhibits or drawings and does not ordinarily allow the Government to play tapes in criminal cases, insisting upon reading an agreed-upon transcript.

2. Enforcement of the Rules

Judge McBryde's manner of enforcing his rules is harsh and often humiliating. The Committee's review of the transcripts of numerous trials in Judge McBryde's court and the testimony of numerous witnesses reflect the harsh enforcement mechanisms utilized by Judge McBryde. The Committee heard numerous examples of Judge McBryde's telling lawyers in front of the jury words to the effect: "If you repeat the question, I'll assume you've run out of good questions and you will be seated" or "Ask another question, if you have one." The transcripts of the cases about which witnesses testified, including Judge McBryde's own witnesses, are replete with Judge McBryde's constant admonishments to counsel to move on to something else; not to allude to a stipulated fact; and orders to (or threats to order) lawyers to sit down during openings or the examination of witnesses. Witnesses further testified that the Court's demeanor when issuing such orders or threats aggravates the oppressive atmosphere.

For example, in the Cushman case, Judge McBryde ordered three attorneys, each representing different defendants, to sit down during their opening statements, ostensibly on the ground that their openings were too "argumentative." The same occurred to two attorneys, including Mr. Martin, in the Coleman

case. The following passage from Cushman is illustrative of the manner in which Judge McBryde chastises attorneys in their opening statements:

> "MR. MILNER: May it please the Court. Members of the jury, as you already know, I represent Larry Colton Anderson, the tall, thin individual seated next to me at the counsel table, the one with the prominent indentation in the middle of his forehead.
>
> THE COURT: Do you want to terminate your argument before you start?
>
> MR. MILNER: No, Your Honor.
>
> THE COURT: Let's stick to the appropriate opening statement.
>
> MR. MILNER: Mr. Anderson is charged in Counts One, Two and Three of the 32 Count indictment. Count 1 is the conspiracy you have already heard described by other people here at the podium and which the Government has already read to you.
>
> Counts Two and Three of the indictment are mail fraud counts. By way of laying a predicate for the evidence which I anticipate you will hear, the Government cannot convict Mr. Anderson of these three criminal offenses without proving beyond a reasonable doubt —
>
> THE COURT: Pardon me, Mr. Milner. I'm going to give you one more chance to stick to what you expect the evidence will show rather than argue.
>
> MR. MILNER: I am merely attempting —
>
> THE COURT: Would you — you may be seated. Mr. Burns.
>
> MR. MILNER: Your Honor, may I please —
>
> THE COURT: You may be seated. Mr. Burns, you may come forward." (Exh C-96, at 52-53.)

Judge McBryde ultimately uses the threat of contempt and sarcasm to enforce his rules. The following example from the Mizell trial in which Judge McBryde threatens to hold Frank McCown, the former U.S. Attorney for the Northern District of Texas and a distinguished trial lawyer with forty-five years experience, in contempt for what he perceives as a violation of

his trial practice rules demonstrates the wide range of enforcement weapons utilized by Judge McBryde:

"Q. Was there more than one bedroom?

A. I would assume so, but I didn't go in any of them.

Q. You only went into one?

A. That's it.

THE COURT: Pardon me. I'm going to give you one more chance, Mr. McCown. If you repeat the questions again, then that's going to be my clue that you've run out of good questions, and you are going to be through with your questioning.

FRANK McCOWN: My apologies, Your Honor.

THE COURT: You may proceed. Ask another question, if you have any more.

FRANK McCOWN: I have quite a few.

THE COURT: Okay. Ask another question. And I don't want any side[-]bar remarks from you. You may proceed.

FRANK McCOWN: I did not mean that as a side-bar, Your Honor.

THE COURT: Let me ask the jury to retire to the jury room a minute.

(Jury Out, 12:05 p.m.)

THE COURT: Mr. McCown, I'm going to give you another warning. You know how to conduct the questioning of witnesses. You know you're not to ask the same question over again a different way. You know that you're not supposed to ask argumentative questions. And you know you're not supposed to make comments as opposed to questions. You are supposed to ask questions.

You know that when I tell you to move on and ask a question or to refrain from doing something, that you're not to argue with me about it. If that kind of conduct continues, Mr. McCown, you're running the risk of being held in contempt of Court." (Exh. C-26, Vol. II, at 110-111.)

The Committee heard numerous additional examples of Judge McBryde's interrupting a lawyer during the questioning of a

witnesses or conduct of the trial to enforce one or more of his rules, sometimes in a harsh, threatening, or sarcastic manner.

Judge McBryde called as witnesses a number of lawyers who had tried cases before him. These lawyers testified that they were able to adapt to Judge McBryde's rules and that they were able to try cases effectively before him. According to these witnesses, if attorneys are well prepared, they have few difficulties with Judge McBryde. The following testimony of Mr. Kirk Claunch is illustrative:

> "Q. Could you characterize you experience of trying that criminal case in front of Judge McBryde as a young lawyer?
>
> A. Well, it was my first case as lead counsel and I was prepared. Judge McBryde followed the rules. He seemed in that case very even-tempered. He gave my client a fair trial.
>
> Q. Did you have any particular difficulties in adapting yourself to his courtroom?
>
> A. No. I had had the opportunity to participate in a civil trial in front of Judge McBryde before so I wasn't unfamiliar with Judge McBryde, but he only asked what any other judge asked, which was be prepared." (Claunch, TR: 1676-77.)

AUSA Roper also testified that while he was never comfortable in Judge McBryde's courtroom, after twenty to thirty jury cases he was "used to" appearing before the Judge and was able to try a case effectively before the Judge.[43]

Several of Judge McBryde's witnesses conceded, however, that Judge McBryde's trial practice rules are indeed highly, and often inappropriately, restrictive. Mr. Richard Alley, who testified that he believes Judge McBryde helped him get into law school and whose family is close to Judge McBryde, maintained an incredible position before the Special Committee. He testified that although he is frequently admonished and interrupted by Judge McBryde during trial, he purposefully

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[43] Mr. Roper agreed, however, that it is a judge's responsibility to run a trial that is fair for an attorney who has never appeared in his court before.

causes such interruptions and admonishments in order to emphasize points to the jury. As even a cursory review of the transcripts of the trials about which Mr. Alley testified suggests, the Special Committee finds Mr. Alley's apologetic rationale for Judge McBryde's repeated interruptions and admonishments during the course of trial proceedings to be unsubstantiated and incredible. Mr. Alley finally admitted that Judge McBryde's constant interruptions did indeed bother him and that they could have interfered with his client's right to a fair trial, although he did not believe they had in the particular cases about which he testified.[44]

Another witness for Judge McBryde, James Warren St. John, conceded in a brief he filed with the Fifth Circuit in the Cushman case that Judge McBryde's "limitation of the manner and scope of questioning dampens any attempt at zealous representation within the bounds of law." (Exh. 2 St.J, at 18.) Mr. St. John also stated in his brief that "[t]he threat of being shut down in both direct and cross-examination if the attorney offend[s Judge McBryde's] questioning procedures chilled the effectiveness of the attorneys." (Id. at 6.) Finally, he admitted that most of his colleagues do not want to appear before Judge McBryde, though many had never actually appeared before the Judge. St. John added that he has never seen occur in any other court, state or federal, the things he witnessed in Judge McBryde's court during the Cushman case.

Mr. Herring testified that the restrictions placed on counsel in Judge McBryde's courtroom are greater than in other courts in his experience and that if every judge were as demanding as Judge McBryde (whom he characterized as a "hard-ass") he would have fewer cases or additional difficulties. Similarly, Mr. Franks testified that Judge McBryde's limits on lawyering

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[44] Mr. Alley also acknowledged that he was bothered by a particular incident involving Judge McBryde in the Sotelo case. There, during one day of the trial, Mr. Alley was caught in a traffic jam and called the court to notify Judge McBryde than he was going to be late for the beginning of the trial. Despite Alley's absence, Judge McBryde called in the jury and had them wait silently in the courtroom for ten minutes. Alley felt that this could have been prejudicial to his client.

are more stringent than other judges and that as an advocate he believes those restrictions are unfortunate. Finally, that it is possible for some attorneys on some occasion to adapt to Judge McBryde's rules is not a vindication of these rules. The weight of evidence presented during the hearings convinces the Committee that Judge McBryde imposes unduly stringent rules on advocates and enforces these rules in an often harsh manner. Indeed, his rules so restrict cross-examination that they impede the effective administration of justice.

Judge McBryde also called as witnesses a number of jurors who had participated in trials in which he presided. These witnesses indicated that Judge McBryde was solicitous toward jurors, ran an efficient courtroom, and did not appear to behave in an abusive manner toward attorneys. This testimony is not surprising, however, since the judge is the central authority figure in a trial. Jurors look to the judge to define for them what is proper and improper in the trial context and then expect attorneys to conform to these standards. The problem identified by the Committee's witnesses, however, is that the standards established by Judge McBryde are often inappropriate. That jurors accept these standards only enhances the risk that they will hold attorneys (and perhaps their clients) accountable for "violations" of Judge McBryde's rules, even though the attorneys are utilizing appropriate trial techniques.

3. The Chilling Effect of the Rules
and the Manner of Enforcement

A broad cross section of attorneys, from the experienced to the inexperienced, from prosecutors to public defense attorneys, from civil practitioners to criminal law attorneys, all attested to the oppressive and intimidating atmosphere that pervades Judge McBryde's courtroom. As Judge McBryde's witness, Mr. St. John, argued to the Fifth Circuit in the context of the Cushman case, Judge McBryde's "limitation of the manner and scope of questioning dampens any attempt at zealous representation within the bounds of law." (Exh. 2 St.J, at 18.)

The testimony of lawyers on the chilling and jarring impact of Judge McBryde's conduct of trials is resounding. With respect to Judge McBryde's constant admonishments not to be

repetitious, Mr. McCown described the impact those repeated admonishments had on him as an advocate:

> "Well, quite frankly, I assume that the easiest way to describe it is it sort of rattles you. It's like two or three quick jabs upside the head. What you are trying to do is keep going. Now you have the trial court interrupting you and in some manner you have aroused the ire of the trial court. You are trying to sit there and figure out what you have done there, what's a proper question? You are doing all this knowing that if you do not come up with an answer like bang, bang, bang somebody is going to be saying over your shoulder 'Move along. I assume that you don't have any more questions,' or something of that nature. As far as having any mental process, you don't." (McCown, TR 361-62.)
>
> * * *
>
> "So at that point you get all sorts of things flipping through your mind. How do I protect error? How far can I go with a trial judge and not be in contempt? What do I have to do to be sure I have reversible error? What do I do to get the question out?. . ..
>
> So all of those things are going through your mind at the present time, which leaves you in, again, a state of disrepair as to why the court is doing this, what the problem is, what you have done that is improper, what you can do to repair it. You have not the foggiest of the clues and no experience to rely upon in a capacity in the past that has ever happened to you, so you are bordering on getting to be ineffective." (McCown, TR 363-64.)

David Martin described for the Special Committee numerous examples of what his complaint referred to as "abusive oppression." From his opening statement where Judge McBryde directed him to sit down in front of the jury to his examination of several witnesses during which he was repeatedly interrupted by Judge McBryde, Mr. Martin described why to him Judge McBryde's treatment of lawyers through harsh application of procedural rules is so oppressive:

> "It is like none other than I have ever been in. The judge is your opponent. He's the adversary. You cannot guess

what's going to make him mad. You can't figure out what's objectionable and what's not. You know that you are going to be continually embarrassed and humiliated for having done no wrong. Even if you ask a leading question or even if you ask for inadmissible evidence, the other guy makes an objection and the judge sustains it or overrules it. Not so here. It doesn't matter what you do. You are going to get embarrassed in front of the jury just with the hostility and a malice that is completely uncalled for and absolutely destroys the litigant's ability and right to try the case to the juror." (Martin, TR: 168.)[45]

Dominic Gianna is an experienced attorney with more than twenty years trial experience in courts throughout the country; he has taught trial practice for the National Institute of Trial Advocacy (since 1984) and at the Louisiana State University Law School (since 1991). He testified about the oppressive atmosphere that was pervasive in Judge McBryde's courtroom during a recent trial (April 1997) in which he was counsel for the defendant. Despite obtaining a favorable judgment in the case for his client, a department store accused of wrongful discrimination, Mr. Gianna's experience during trial was difficult because of the manner in which Judge McBryde

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[45]It was apparent to the Special Committee that Mr. Martin has a forceful personality and is indeed a strong advocate for his clients. Through his own witnesses and through cross-examination of Mr. Martin, Judge McBryde brought to the attention of the Special Committee that Mr. Martin's conduct in wholly unrelated matters has been questioned from time to time and that some find him to be overzealous in his representation. We are mindful of the need for a District Judge to control his courtroom. Were Mr. Martin's complaint the only one addressing the manner in which Judge McBryde conducts trials, it would be difficult for us to draw generalized conclusions based on his assertions about Judge McBryde's courtroom conduct, and we would consider that this was an isolated personality clash. Having heard from a number of other witnesses and reviewed transcripts of numerous proceedings not involving Mr. Martin, however, we are struck by the similarity of Mr. Martin's complaints and the complaints of other witnesses who appeared before the Special Committee. We view Mr. Martin's allegations therefore not in isolation, but in light of all the evidence presented to the Special Committee.

conducts trials. From Mr. Gianna's perspective, the cumulative effect of Judge McBryde's trial rules and the manner in which he enforces them affected Mr. Gianna's ability to function effectively as an advocate for his client. The oppressive courtroom atmosphere caused an experienced attorney like Mr. Gianna to skip certain questioning of witnesses because he feared being criticized in front of the jury, and to fail to raise what he believed were valid objections and motions because he was intimidated.

When asked to compare the courtroom atmosphere in Judge McBryde's court with other courts, Mr. Gianna summed up his experience as follows:

> "I found it to be very oppressive. I found it — I observed things. I watched things. It appeared that everyone was walking on eggshells —
>
> I can best describe it as being in a room where you feel the atmosphere is so thick that one is almost afraid to do anything that could result in a comment from the bench." (Gianna, TR: 514)[46]

Other witnesses who did not discuss any case in particular testified generally about the oppressive and chilling nature of Judge McBryde's trial procedure rules and his harsh enforcement of those rules. First Assistant Federal Public Defender Paul Stickney, who has tried more than ten cases before Judge McBryde and supervises several other attorneys who have tried numerous cases before Judge McBryde, testified about the stress caused by Judge McBryde's conduct of trials and proceedings. He also testified that as a result of the way Judge McBryde conducts jury voir dire, his attorneys as a practice decline to ask questions during voir dire because of the fear that the first

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[46] Judge McBryde called as a witness Mr. Gianna's opponent in the Manashirova trial, Jim Franks. Mr. Franks testified that he did not feel intimidated or humiliated during this trial and that he did not perceive that Mr. Gianna was mistreated in any way during the trial. This evidence does not discredit the testimony of Mr. Gianna that he found Judge McBryde's trial practices to be oppressive. Indeed, as noted, Mr. Franks indicated that, as an advocate, he found many of Judge McBryde's limitations on lawyering to be "unfortunate."

impression jurors will have of them will be one of ridicule. Mr. Stickney further testified that he must severely limit his arguments and evidence when trying a case before Judge McBryde because of the way the Judge restricts his ability to structure his case.

AUSA Paul Gartner, who is Deputy Chief of the Criminal Division of the U.S. Attorney's Office in Fort Worth and who has had approximately ten trials in Judge McBryde's court, testified that the atmosphere in Judge McBryde's court is "[e]xtremely tense, very quick-paced" and "intimidating at times." (Gartner, TR: 1306.) He testified that he has been personally intimidated by Judge McBryde into twice taking a position which, in his judgment, he should not have taken.

Michael Heiskell, an experienced criminal defense lawyer, characterized Judge McBryde's effect on him in the following way when asked why he did not pursue an objection more vigorously during the Burgos trial:

> "Well, again, as I stated earlier, I didn't want to incur the wrath of the court in front of a jury. I'm very mindful that, in being very assertive and vigorous with the court, the court will be very short and stern and reprimand you in front of the jury in such a fashion that not only is it embarrassing to counsel, but it's not helpful, in my opinion, to my client when they see the court acting such a way toward the defendant and his counsel." (Heiskell, TR: 1352.)

The chilling effect of the oppressive courtroom atmosphere and its cumulative impact on lawyers who frequently appear before Judge McBryde point not only to the need to remedy the situation, but also to the inadequacy of the appellate process as an appropriate means of redress. The testimony of lawyers demonstrates that the combined effect of Judge McBryde's rules and the manner of their enforcement often results in a decision on their part to forgo action out of either a personally or strategically motivated fear of being humiliated, embarrassed or admonished in the courtroom. Error for the purposes of appeal simply cannot be preserved under those circumstances. Moreover, on what grounds can a lawyer effectively appeal when his or her representation was not as effective as it other-

wise would have been had the lawyer not been more concerned with appeasing Judge McBryde than advocating for his or her client?

4. Reasons for the Special Committee's Concerns

The Special Committee is fully cognizant of the notion that a trial judge should be afforded broad discretion to manage and conduct trials over which he or she presides. The Special Committee is also aware that courts in this Circuit employ various techniques (e.g., time limits, cumulative evidence rules and rules regarding the scope of cross-examination) in trial management. Nonetheless, the Special Committee feels compelled to address the manner in which Judge McBryde conducts his trials for several reasons. First, Judge McBryde's extreme and unduly restrictive rules (and the manner in which they are applied) are different not only in degree but also in kind from the wide array of acceptable trial management rules. Second, the Committee did not merely hear evidence about difficulties in an isolated or aberrant trial. It heard evidence of a pattern of procedures and enforcement techniques with respect to numerous trials spanning the length of Judge McBryde's tenure on the bench. Third, the sweeping and chilling effect of Judge McBryde's trial practices suggests that the Council may be the only forum that can adequately review and seek to redress the totality of harm that has resulted from Judge McBryde's repeated practices in this regard. Finally, the Fifth Circuit has already attempted to convey to Judge McBryde that the cumulative effect of his trial procedures impedes the ability of lawyers to try their cases. See Sims v. ANR Freight System, Inc., 77 F.3d 846, 850 (5th Cir. 1996) ("There is a benefit for the judge to permit lawyers a fair opportunity to present their evidence in the light most favorable to their claim. Unduly restrictive procedures can have a negative impact on the quality of a trial, whether it be a jury trial or a bench trial. Though the procedures that were the basis of this appeal did not result in a reversal of the judgments, we trust that the district court will reevaluate the restrictions on the lawyers' ability to present facts in a comprehensible manner so that reversal in other cases, and the resulting expenses to litigants, might be avoided."). In view

of Judge McBryde's reaction, the Special Committee believes that the Council must act.

C. Judge McBryde's Witnesses

Aside from the trial practice witnesses discussed above, Judge McBryde called a number of other witnesses on his behalf in the course of the hearings before the Special Committee. These witnesses included members of his chambers staff, including his court coordinator, a former secretary, and two former law clerks. These witnesses testified that Judge McBryde was always cordial and considerate in his dealings with them, that he was hardworking and thorough, and that he had never lashed out at them, questioned their honesty, or attacked their loyalty. Judge McBryde also called as witnesses several GSA employees and probation officers, who provided similar testimony.

The Committee has no doubt that Judge McBryde is typically thoughtful and polite in dealing with members of his staff and court personnel. As demonstrated by his behavior toward Nancy Doherty in the Torres case, however, Judge McBryde can be harsh when he perceives that an official of the court system subordinate to him does something that he perceives as questioning his judgment or authority. Furthermore, the fact that Judge McBryde behaves appropriately toward his staff and other court employees does not refute the evidence showing his abusive treatment of attorneys and litigants appearing before him in court.

Judge McBryde also called as witnesses several attorneys who have briefed motions or had short bench trials before him. These witnesses indicated that Judge McBryde prepares thoroughly, addresses motions promptly, and writes scholarly opinions on difficult legal questions. As Jay Doegey, City Attorney for the City of Arlington, Texas testified:

> "In fact, that's the one thing about Judge McBryde you can depend on, is he reads everything thoroughly. He understands it. He is not afraid at all to make law decisions and do it quickly. I appreciate it because to do otherwise, to let those motions for summary judgment sit for weeks and months and you approach deadlines for trial, it doesn't

save you a whole lot of money if we don't get the answers to those critical questions . . . ." (Doegey, TR: 1472.)

Judge McBryde also himself testified about his success in addressing the court backlog problem he inherited when he was appointed and in moving cases expeditiously. The Committee credits the testimony of Judge McBryde and his witnesses on these subjects and has no doubt that Judge McBryde works diligently and addresses matters promptly. This evidence does not, however, respond to, let alone refute, the evidence presented to the Committee concerning Judge McBryde's abusive treatment of attorneys in other contexts.

D. Patterns of Conduct

When viewed in isolation, the incidents described above run the gamut from outrageous to inappropriate. When viewed together, the incidents bespeak several alarming patterns of conduct exhibited by Judge McBryde over the course of his tenure on the bench.

1. Proclivity to Question Integrity

One pattern that emerges is Judge McBryde's proclivity to question the integrity of attorneys appearing before him. Frequently, Judge McBryde has exhibited distrust of attorneys' motives, often directly accusing them of lying or conspiring to deceive him. In the Dawson case, he not only accused AUSAs Claude Brown and Wayne Hughes of engaging in bad faith negotiations and making statements "unworthy of belief," but he also accused the entire Civil Section of the U.S. Attorney's Office in Fort Worth of being less than candid. In Turner I, Judge McBryde's accusations against Assistant Public Defender Tim Henry and the entire Federal Public Defender's Office were similar to Dawson: (i) first, he found deceit by reasoning as follows: a competent lawyer would have done X; you are a competent lawyer; therefore, I find you are lying when you said you did not do X and (ii) then he denigrated the entire office of attorneys as being less than candid with the court as a practice. In the Anderson case, he accused AUSA Fred Schattman of "bad faith" because Mr. Schattman argued that the U.S. Attorney's Office should live up to its part of a plea agreement, just as he accused the SEC of "bad faith" for standing on principle in Van Waeyenberghe. Further, Judge McBryde indicated to

Federal Public Defender Ira Kirkendoll during a 1993 meeting that he was concerned that the U.S. Attorney's Office and the Federal Public Defender's Office were engaged in a conspiracy to subvert the Sentencing Guidelines.

In Turner II, Judge McBryde wrote that AUSA William Martin's representations regarding the cooperation of Mr. Turner were "less than candid, if not fabrications in whole or in part" simply because he assumed, without consulting Martin, that notes detailing the cooperation must exist.[47] In Satz, Judge McBryde accused both AUSA Darcy Cerow and Postal Inspector Whiteaker of lying about the scope of Judge Rosenblatt's sealing order, without taking the simple step of calling Judge Rosenblatt himself as to the scope of the sealing order as he had been urged to do.

Judge McBryde's refusal to take simple steps to verify whether or not his suspicion of bad faith on the part of others is justifiable is also reflected in the Torres, Anderson, and Turner II matters. In Torres, Judge McBryde, without taking the simple step of researching the law, suggested in a public order that Nancy Doherty, a public servant, was conspiring with the lawyer for the minor plaintiff against that minor, merely for her suggestion which was in fact correct that the only remedy for the mistake was the institution of an action under the Federal Tort Claims Act. In Anderson, Judge McBryde found, without inquiring of U.S. Attorney Marvin Collins (whom he required to appear in his court), that the U.S. Attorney's Office was attempting to curry favor with the defendant because of a relationship between an investigator and the defendant. In Turner II, Judge McBryde, without allowing AUSA Martin the opportunity to explain why no contemporaneously drafted notes detailing Mr. Turner's cooperation were found to exist, concluded that Mr. Martin was fabricating the fact of Mr. Turner's cooperation.

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[47] Here, Judge McBryde adopted a rigid analysis similar to that found in Dawson and Turner I: if cooperation occurred, there must be notes; no notes were produced; therefore any claims of cooperation must be "less than candid, if not fabrications in whole or in part."

After imposing a humiliating sanction on Belinda Saulsberry, Judge McBryde either suspected that she had filed a false affidavit detailing her compliance with his sanction order or deliberately wanted to humiliate her further, and required her to file an extensive supplemental affidavit. Judge McBryde accused Assistant Federal Public Defender Matt Golla of purposefully sandbagging him in the Davis case. Most recently, Judge McBryde accused attorney Lonnie Woods of lying concerning his understanding of an order issued by Judge McBryde.

2. Overreactions and Abusive Sanctions

The second noticeable pattern emerging from the evidence gathered by the Special Committee is Judge McBryde's tendency to over react to perceived transgressions of his rules and expectations or intrusions on his authority. Judge McBryde's incarceration of Assistant Public Defender Peter Fleury is one example. Another is his imposition of the Fourth Floor Order. Judge McBryde's sanction of Belinda Saulsberry; his treatment of Judge Mahon, Nancy Doherty, AUSA John Teakell and Arch McColl; his barring of Matt Golla from his courtroom; his ordering of the prosecution of Lonnie Woods for contempt and possible ethical violations; and his threat to hold Frank McCown in contempt during the Mizell trial all reflect an abusive tendency and lack of judicial temperament.

Like his proclivity to question the motives of those appearing before him, this tendency to overreact and to impose disproportionate sanctions makes conducting trials or other proceedings before Judge McBryde extremely stressful on some lawyers. Messrs. Henry, Sanders, and Brown in fact left their respective places of employment in part due to the stress caused by Judge McBryde's tendency to abuse lawyers appearing before him. The Special Committee heard both first and second-hand testimony about how Judge McBryde's sanctions and attacks on lawyers' integrity have had debilitating effects on several competent, well-respected professionals. Experienced trial attorneys told the Special Committee that the manner in which Judge McBryde treated them and other attorneys caused them to be flustered and fearful during trials.

3. Obsessive Need to Control

Another theme that emerges from the evidence is Judge McBryde's need to assert control and impose his priorities on others even where circumstances seem to warrant accommodation and flexibility. Judge McBryde's trial rules — severe restrictions on an attorney's direct and cross-examination of witnesses; his five-minute openings; and his use of stipulated facts — and their sometimes harsh and rigid application are perhaps the clearest reflection of his need to control all aspects of proceedings around him.[48] For example, Judge McBryde's insistence in the Burgos case that Mr. Heiskell call the defendant to the stand after 6:00 p.m. for fifteen minutes of testimony, even though Mr. Heiskell's trial strategy was to have his client testify last, reflects the fact that Judge McBryde is motivated by considerations of speed and control with no apparent thought to consequences.

In addition, his need to assert control and priority over other persons and proceedings underlies a number of the specific incidents about which the Special Committee heard evidence. The Fourth Floor Order is a paradigmatic example of Judge McBryde's need to control attorneys appearing before him. As a consequence of one attorney's justifiable forty-five-minute unavailability for a jury verdict, Judge McBryde imposed a sixteen-month restriction on the actions of all the

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[48] When asked about these procedures, Judge McBryde emphasized that they were not adopted solely to expedite the proceedings. Instead, he indicated procedures such as the reading of stipulated facts and the prohibition on the repetition of prior testimony were adopted based upon his conclusion that they were the best way to present evidence to a jury. Judge McBryde rejected the suggestion that lawyers should be permitted to develop the facts of a case in the manner they see as most effective: "[I]f I didn't have a degree of control over what happens in the courtroom, it would just go amuck." (Id. at 2158.)

Of course, the Special Committee does not dispute that a trial judge has both the responsibility and the discretion to adopt and enforce rules for the effective presentation of evidence. What is striking about Judge McBryde's rules, however, is their rigidity and attention to all minutiae of a case. In Judge McBryde's courtroom, there is simply no room for creativity or diversity in the way a case is presented.

public defenders during jury deliberations. Judge McBryde's treatment of Texas State Court Judge Thomas Lowe bespeaks his need to control his own schedule at the expense of others, as does his failure to call another matter when it became apparent that Assistant Public Defender Peter Fleury was occupied before Judge Means. Judge McBryde's incarceration of Peter Fleury for refusing to answer a question posed to him by Judge McBryde during the course of a routine, non-emergency hearing regarding the substitution of counsel can also be seen as an effort by Judge McBryde to control a proceeding before him by imposing a drastic sanction on Mr. Fleury in the hope that it would bring the proceeding to a quick close.

Judge McBryde's insistence that Mr. Satz be sentenced in his court before being sentenced in Arizona also fits into this pattern of inflexibility and control. Judge McBryde's harsh treatment of Nancy Doherty in the Torres matter is, in part, a by-product of his emphatic assertion of control and a rebuke of Ms. Doherty for what Judge McBryde perceived as an attempt to circumvent his control.

Judge McBryde's barring of Matt Golla and his complaints to Ira Kirkendoll also bespeak his desire to control the workings of the Federal Public Defender's Office. Similarly, Judge McBryde's abusive treatment of AUSA John Teakell over the failed teleconference can be seen as another effort to assert control over the operations of the U.S. Attorney's Office.

4. Inappropriate Conduct Toward Fellow Judges

The final pattern noticed by the Special Committee is Judge McBryde's apparent disregard and lack of respect for his fellow judges. A federal judge should strive to foster collegiality and cooperation with his or her fellow judges, whether they be within the same district, outside the district or in the state system. To the contrary, Judge McBryde's conduct has at times fostered just the opposite. He did not a return an important telephone call placed to him by Judge Lowe about a scheduling matter. Then he instructed his clerk to tell Judge Lowe that he was not welcome in chambers. After having treated Judge Lowe so disrespectfully, he never called him to explain or apologize, despite Judge Lowe's invitation for him to do so. Similarly, Judge McBryde demonstrated utter disregard for

Judge Rosenblatt in his handling of the Satz matter by (i) refusing to call him to find out the true nature of Judge Rosenblatt's sealing order and (ii) characterizing (in open court and on a public record) Judge Rosenblatt's actions in parallel proceedings in Arizona as an effort at "manipulation." As with Judge Lowe, Judge McBryde never extended Judge Rosenblatt the basic courtesy of calling him to discuss these matters prior to levying his criticisms.

Equally, if not more, deplorable is Judge McBryde's treatment of Judge Mahon. Judge McBryde succeeded Judge Mahon on the bench, and Judge Mahon desperately wanted him to succeed. Yet, Judge McBryde accused Judge Mahon of not supporting him enough and recently called him "despicable" in the presence of other judges.

Judge McBryde's relations with Judge Sanders appear to be strained as well and his relationship with Judge Means is openly hostile.

Judge McBryde has offered some explanations for the status of his relationships with, and treatment of, each of the judges mentioned above. His explanations help the Special Committee to some extent in its understanding of specific negative episodes involving other judges, but they do not justify his treatment of his fellow judges in the Special Committee's mind, nor do they shed any light on this inexplicable pattern of inappropriate conduct toward his colleagues on the bench.

5. Effect on Legal Community

Perhaps the Committee's greatest concern (and the most troubling testimony presented) is the pervasive and chilling impact Judge McBryde's treatment of people has had on the Fort Worth legal community. Judge McBryde has engendered a genuine sense of fear in a startlingly broad spectrum of the Fort Worth bar. In the trial practices section above (Part III.B), we discussed specific instances in which intimidation by Judge McBryde and fear of him caused competent, well-regarded lawyers to fail to take positions they otherwise would have or caused them to become flustered and ineffective:

- Frank McCown, a former U.S. Attorney with forty-five years experience as a trial lawyer, spoke of being so

jarred by Judge McBryde's treatment of him during the Mizell trial that he was bordering on being ineffective;

- Dominic Gianna, also an accomplished trial attorney, relayed to the Committee that fear of Judge McBryde caused him to fail to make a motion for a directed verdict at the proper time and to fail to develop certain testimony he thought important because he was fearful of Judge McBryde;
- Paul Gartner, the Deputy Chief of the Criminal Division and an experienced AUSA, testified that he did not take certain positions he felt he should have in the Mizell case because he was intimidated by Judge McBryde;
- Mr. Stickney, the First Assistant Public Defender and an experienced trial lawyer, testified that the attorneys in the Public Defender's Office generally forgo asking questions during jury voir dire out of the fear that Judge McBryde will embarrass them in front of the jury panel, leaving a negative first impression of them or their client in the jurors' minds;
- Michael Heiskell, a distinguished criminal defense lawyer and former AUSA, testified that his lawyering during the Burgos trial was altered because of Judge McBryde's demeanor and Mr. Heiskell's concern about upsetting him; and
- Warren St. John, who testified for Judge McBryde, conceded that during the Cushman case Judge McBryde's rules and restrictions were chilling on the lawyers and that his colleagues do not want to appear before Judge McBryde.

The Committee also heard testimony from supervisors in both the U.S. Attorney's Office and the Federal Public Defender's Office about the broader effect Judge McBryde has had on the attorneys in those offices. Marc Barta, an Executive Assistant United States Attorney in charge of the day-to-day operations of the entire Fort Worth office of the United States Attorney, testified about a tangible way in which the sense of fear engendered by Judge McBryde has manifested itself in the Civil Division of the U.S. Attorney's Office:

> "There has evolved a practice that any document, no matter how routine or normal or how many times it may have been filed in the same substance before, when it is going to be filed in Judge McBryde's court, every Assistant, no matter what their level of experience — and we have no one in that section with less that 10 years of litigation experience — that every motion of any kind is taken to [Mattie Compton, the Deputy Chief of the Civil Division] for a review.
>
> It's not a review, necessarily — although sometimes a component of it is; whether or not this is the best response that can be made or the best position cases have been cited (sic). It is basically a review. 'Is there anything in here that he can get me for? Can I get in trouble? Is he going to somehow be mad at me or sanction me for filing this particular pleading?'" (Barta, TR: 1260.)

This practice was instituted by the rank and file in the office as a form of self-protection. Mr. Barta also testified that it is "an absolutely continuing struggle in every case that [the office has] to make sure the settlement offers [the attorneys] make are influenced only by [their] best litigation judgment and not by some fear of personal reprisal for what may or may not happen." (Barta, TR: 1257-58.) Mr. Barta also described the immediate reaction of genuine concern a simple phone call from Judge McBryde's chambers to any attorney in the office causes throughout the office and his belief that, as a result of the Dawson case, Assistant U.S. Attorney Wayne Hughes became a less effective attorney because of the fear engendered in him by Judge McBryde. Finally, Mr. Barta testified that no AUSA from Dallas is willing to come to Fort Worth to fill a long-standing vacancy there.

Paul Gartner, the Deputy Chief of the Criminal Division, testified similarly. According to Mr. Gartner, John Teakell whom Judge McBryde had found in contempt in the telephone conference incident was petrified about having to appear before Judge McBryde after having testified in these hearings. His fear was so great that he asked Mr. Gartner to transfer him off a case set to go to trial in front of Judge McBryde, even though he was the assistant in the office most knowledgeable about the case.

Mr. Gartner also told the Committee about a conversation he had with retired AUSA Claude Brown who was the AUSA (along with Wayne Hughes) involved in the Dawson case:

> "I was talking to Mr. Brown a few days before this Committee first convened in New Orleans and Mr. Brown was indicating hesitancy to appear in New Orleans. I said, 'Well, Claude, that's your decision, but you're retired now. That's your decision. You are going to have to make that decision.' He expressed to me, 'Paul, I'm afraid that I would get appointed on some case and then end up back in Judge McBryde's court.'" (Gartner, TR: 1336-37.)

Mr. Kirkendoll's and Mr. Stickney's descriptions of the effect on the Federal Public Defender's Office are strikingly parallel. They both described the high stress level under which their attorneys function when involved in a case before Judge McBryde. According to Mr. Kirkendoll: "I had had complaints that people were burning out — and I could see that — because of the demand and the difficulties and the personal attacks that were occurring on them in Judge McBryde's courtroom." (Kirkendoll, TR: 862.) Mr. Kirkendoll also described that his attorneys do not sleep well on nights before routine docket calls in Judge McBryde's court. As supervisors, Mr. Kirkendoll and Mr. Stickney attempted to devise a rotation system through which they would alleviate some of the stress on attorneys who were frequently appearing before Judge McBryde by allowing those attorneys to take some Dallas cases and asking the Dallas attorneys to take some cases in front of Judge McBryde. That system proved too difficult to implement after Mr. Stickney was transferred to the Fort Worth office in the wake of Judge McBryde's barring of Matt Golla from his court and because the attorneys in Dallas were reluctant to take cases before Judge McBryde.

The morale in both the U.S. Attorney's and Federal Public Defender's Offices has, not surprisingly, been negatively affected by Judge McBryde's treatment of the attorneys in those offices. The testimony of Messrs. Barta, Gartner, Kirkendoll and Stickney, not to mention Teakell, Sanders, Henry, Fleury and Golla, attests to the negative impact Judge McBryde's conduct has had on office and individual morale. Indeed,

Messrs. Sanders, Henry, and Brown decided in part because of Judge McBryde to leave jobs they enjoyed.

Judge McBryde's negative effect on the Fort Worth legal community goes beyond the U.S. Attorney's and Federal Public Defender's Offices. Nancy Doherty's testimony evidences the impact on the Clerk's Office for the Northern District of Texas. In addition, the Committee heard testimony from Judge Eldon Mahon, Judge Barefoot Sanders and Judge Terry Means that they received numerous complaints from a wide array of lawyers about Judge McBryde's conduct on the bench. Michael Heiskell testified that he generally charges clients a 15 percent to 20 percent higher fee to represent to them, if the case is before Judge McBryde. Committee Exhibit C-98, the Tarrant County Bar Association Judicial Evaluation Survey for 1993, is consistent with this pervasive feeling in the Fort Worth legal community that Judge McBryde does not treat attorneys well. Seventy-eight percent of those who responded answered "no" to the question of whether Judge McBryde demonstrates proper judicial temperament. Ninety-four percent or more of those who responded answered "yes" with respect to the same question for the other three district court judges.

The Committee is extremely concerned about the negative and chilling impact Judge McBryde's behavior has had on the legal community of Fort Worth. In addition to the evidence adduced at the hearings, the reluctance of witnesses to come forward and to testify in these proceedings because they feared reprisal from Judge McBryde underscores the sense of fear Judge McBryde has caused throughout the Fort Worth legal community. Although Judge McBryde did present witnesses who testified that they are not intimidated by him, the evidence is unmistakably clear that Judge McBryde has engendered a sense of fear and dread in a significant portion of the Fort Worth legal community. Needless to say, this brings disrepute on the entire federal judiciary and negatively impacts the effective administration of justice within the Northern District of Texas.

The Committee believes that the Council has the unique responsibility to address this pervasive negative impact not merely because it brings disrepute on the judiciary and adversely affects the effective and expeditious administration of

justice and business of the courts within the Fifth Circuit, but also because no other effective remedy may exist. The very nature of the effect of Judge McBryde's pattern of conduct — the failure of lawyers to act; the decision to forgo asking questions or moving for relief; the sleepless nights; the refusal to accept cases; the decision to seek employment elsewhere; the compromising of advocacy as a form of self-protection — cannot be remedied through the appellate process and often cannot even be articulated in isolation. Nevertheless, the harm to administration of justice is palpable and must be redressed.

Needless to say, these patterns are extremely troubling to the Special Committee and unfortunately suggest the likelihood of continuation.

V. DR. OSOFSKY'S REPORT

The Special Committee retained as its consultant Dr. Howard J. Osofsky, M.D., Ph.D., Professor and Chair of the Department of Psychiatry at the Louisiana State University School of Medicine in New Orleans, to be present at the hearings. Dr. Osofsky then attended the closed hearings in New Orleans from August 25 to August 29, 1997, and in Fort Worth, Texas, from September 29 to October 2, 1997. Dr. Osofsky heard the testimony of the fifty-five witnesses who testified, along with the testimony of Judge McBryde.

On November 4, 1997 Dr. Osofsky tendered his report to the Special Committee. This report, and his response to a supplementary question posed by the Special Committee, are in Attachment A. This report summarized his impressions after observing Judge McBryde and the various witnesses during the hearings from August 25, 1997 to August 29, 1997, in New Orleans and from September 29, 1997 to October 2, 1997, in Fort Worth.

We remind the Judicial Council of the reasons underlying and the confined objective of Dr. Osofsky's participation in this proceeding, set forth in Part II of this Report. Dr. Osofsky was careful to explain that it is neither possible nor ethical for him to make a professional psychiatric diagnosis from observations at the hearings and accordingly has made no such diagnosis and has reached no conclusion as to whether Judge McBryde does or does not have a psychiatric problem. He did respond to the

third option, writing that based on his observations there "is cause for some concern" that "[o]nly a thorough medical and psychiatric evaluation can substantiate or rule out."

Dr. Osofsky briefly explained the reasons underlying his conclusion. Based on his attendance during the nine days of hearings, he observed that Judge McBryde has apparently made a number of decisions which could be perceived as rooted in arbitrariness, suspiciousness, anger, arrogance, and contempt. Especially with respect to the attorneys who appear before him, Judge McBryde does not seem to fully consider the impact of his decisions upon their self-esteem and their careers. The instances of concern have occurred repeatedly over a period of years, with Judge McBryde showing little sense, even with his growing experience, of reflective reconsideration about his behavior and decisions. Dr. Osofsky explained his growing concerns as the hearing went on about Judge McBryde's being arbitrary, distrustful, and suspicious of fellow Judges and lawyers. Judge McBryde repeatedly has conveyed his belief that others wish to deceive him, with Dr. Osofsky citing Judge McBryde's conviction that both the Public Defenders and Assistant United States Attorneys are not being fully candid with him. The offense of disobeying or appearing discourteous to the court has seemed to outweigh all other considerations. Dr. Osofsky noted the apparent arbitrary punishment of the entire Public Defenders' Office for a mistake by one attorney in that office, which was justified by Judge McBryde as educational. Dr. Osofsky explained that that testimony and Judge McBryde's own statements indicate an apparent arrogance, an expectation of special treatment, and some lack of sensitivity to the concerns of others.

Dr. Osofsky observed that a number of the behaviors and reactions described during the hearings are consistent with those commonly observed in individuals suffering from psychiatrically defined Paranoid and Narcissistic Personality Disorders, but that such behavior and reactions are also consistent with a variety of medical problems.

The Special Committee asked Dr. Osofsky to supplement his report by responding to the hypothetical question of assessing the prospects for treatment if further evaluation established

that Judge McBryde is suffering from Paranoid and Narcissistic Personality Disorder.

Based on his observations during the nine days of hearings and his examination of the record presented during the hearings, Dr. Osofsky responded on November 17, 1997 that if, after adequate evaluation, Judge McBryde is indeed definitively diagnosed with Paranoid or Narcissistic Personality Disorder, many factors learned during the course of the evaluation would help in determining treatment and likelihood for the success of that treatment. In light of his observations during the hearing, Dr. Osofsky cautioned, however, that important factors in determining prognosis would be the patient's recognition, appreciation and acknowledgment of the circumstances and his willingness to participate in the treatment. In conclusion, Dr. Osofsky stated that "without such appreciation and willingness to participate in treatment the prognosis is very guarded."

In accordance with adopted procedure, the Special Committee set a date for Judge McBryde's counsel to cross-examine Dr. Osofsky about the reports and bases therefor. Counsel for Judge McBryde wrote to Counsel for the Special Committee that he declined to question Dr. Osofsky prior to issuance of this Report, citing, inter alia, lack of detail in his report and the demands of Judge McBryde's schedule.

VI. CONCLUSION AND RECOMMENDATIONS

The task of the Judicial Council is to determine whether Judge McBryde should be certified as disabled pursuant to 28 U.S.C. § 372(b) and whether Judge McBryde "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). Before we set forth the recommendations and general rationales therefor, the Judicial Council should be aware of the general legal objections that Judge McBryde has raised throughout this proceeding, and the positions of the Special Committee, after extensive research and consideration, with respect thereto.

A. General Legal Positions

Judge McBryde has raised constitutional objections to this, and indeed any, Section 372(c) proceeding, largely based upon the assertions that it is a violation of the separation of powers and it is a violation on the principle of judicial independence

underlying Article III. In effect, the argument reduces to the position that only Congress can "sanction" a federal judge, and then only by removal from office by use of the Impeachment Clause. It is an understatement to say that the Special Committee, composed of Article III judges even if not sitting in a judicial capacity, is mindful of the principles and values articulated with respect to separation of powers and judicial independence. But we are also mindful of the fact that the process in which the Judicial Council is engaged is not a recent creation of Congress. The genesis of the concept of Judicial Councils was suggested to Congress by the Judicial Branch almost 60 years ago; the 1980 Act and the 1990 amendments thereto were a product of cooperation, input, and agreement by the Legislative and Judicial Branches;[49] and the Judicial Branch had been involved in a more limited form of inquiry of Article III judges for almost 200 years.[50] Some form of "accountability" of Article III judges short of removal from office, and some forum for so determining short of impeachment proceedings in Article I institutions, are permissible. Indeed, the fact that Congress permitted the Judicial Branch to be the forum is far less threatening to either the principle of separation of powers or the principle and values of judicial independence of Article III judges than if such inquiries were performed by another Branch. The Special Committee, like Article III courts which

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[49] Judicial Councils for each Circuit were originally created in 1939 at the urging of Chief Justice Hughes and other prominent federal judges. See, generally, Chandler v. Judicial Council, 398 U.S. 74, 85 (1970); see also, id., at 96-98 (Harlan, J., concurring). The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 was also the product of "consensus and compromise" both among the three branches and between the two Houses of Congress. See, generally, H.R. Rep. No. 101-512, 101st. Cong., 2d Sess. 10 (1990). The Judicial Conference of the United States courts drafted a model bill that became the basis for the version of the legislation adopted by the House. When this House bill was ultimately reconciled with a separate Senate version in conference, the key principles and provisions of the judicial conference model were retained. See, id., at 10.

[50] See note 55, infra.

have addressed these issues,[51] believes Section 372(c) proceedings are constitutional.

The second legal argument advanced by Judge McBryde is that the investigation and hearing in this proceeding involve the "merits" of his actions as an Article III judge, and that Section 372(c) and principles of appellate review preclude the Judicial Council from acting upon the matters that are the subject of the Findings of Fact. Judge McBryde relies upon Section 372(c)(3)(A)(ii), which provides that, upon receiving a complaint, a Chief Judge "may" dismiss a complaint of judicial misconduct if the Chief Judge concludes that the complaint is "directly related to the merits of a decision or procedural ruling."[52]

In accomplishing its task, the Special Committee was evermindful that Section 372(c) is not an alternate avenue for appeal of matters directly related to the merits of any particular decision. But the focus of this Section 372(c) proceeding is directed at the conduct and the mental health of a judge. Neither we nor the Council would utilize Section 372(c) to investigate a judge because a jury charge given or a summary judgment decision rendered by a judge was "wrong" or "incorrect."

But just because Section 372(c) is not a substitute for appeal, it does not follow that any act of a judge that even might conceivably be the subject of an appeal is therefore by definition outside the permissible scope of and immune from investigation in a Section 372 proceeding. In reviewing the conduct and actions of any judge in a Section 372 proceeding, we recognize

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[51] Hastings v. Judicial Council, 829 F.2d 91 (D.C. Cir. 1987); In re Certain Complaints, 783 F.2d 1488 (11th Cir. 1986).

[52] Section 372(c)(3) provides in relevant part:

> (3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may —
>
> (A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous.

there is a continuum. Exactly where in that continuum stands the "merits" line over which a Judicial Council or Special Committee may not cross is in most instances fact specific.[53]

We will make some observations. There seems to be less danger of even approaching let alone crossing that line when the subject matter of the Section 372 proceeding relates to a complaint by a party to a case that is "final" in a legal sense. The parties have received their judgment, and the appellate courts have made rulings. Similarly, there is less danger of approaching or crossing the line when the subject matter of the Section 372(c) proceeding is a complaint involving the conduct, actions, or demeanor of a judge. There is less danger when the subject matter of a Section 372(c) proceeding involves a pattern of a judge's conduct and behavior in a number of cases over time, which pattern by its very nature cannot be reviewed on appeal of a case. Indeed, it has been noted that a judicial council may not "pass upon allegations relative to a judge's disposition of a particular piece of litigation, absent any . . . corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office." In re Charge of Judicial Misconduct, 593 F.2d 879, 881 (9th Cir. 1979) (emphasis added) (quoted in In re McBryde, 117 F.3d at 230).

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[53] We observe that the statute itself is not prohibitory ("shall dismiss a complaint") but permissive ("may dismiss a complaint"), and even then the statute carefully uses the adverb "directly" as a qualifier of the phrase "related to the merits." We believe this language evinces the recognition that judgment and discretion based on the particular circumstances control, and even then the "merits" can be indirectly approached in a Section 372(c) proceeding. Moreover, we note that the statute refers only to the "merits" of a "decision" or a "procedural ruling." Rules of statutory construction would suggest that Congress intended to cover two distinct classes of actions, which may not comprehend the entire range of actions in which a federal judge engages.

This is no reason to address further such issues. We raise them only to suggest that the form and the actual language of Section 372(c)(3) upon which Judge McBryde relies is far narrower and less precise than his argument suggests.

In advancing his argument concerning the impropriety of the Special Committee and the Judicial Council becoming involved in the "merits" of his actions, Judge McBryde has never purported to draw any line. Rather, his argument reduces, in essence, to the proposition that anything that a judge does in his courtroom or in his capacity as a judge involves the "merits" of something and cannot be scrutinized except on direct appeal, regardless of the manner in which it is done, the persons to whom it is done, the extra-legal consequences of those actions, or the pattern of such conduct that may be disclosed. We reject that position. We observe that the Judicial Conference and other Judicial Councils have upheld or made findings of misconduct in factual contexts that, under the arguments Judge McBryde has previously advanced, would impermissibly involve the "merits" of the judge's actions.[54]

In the view of the Special Committee, the Findings of Fact contained in this Report do not cross any impermissible line

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[54] See, e.g., In re Petition No. 88-372-001 (U.S. Judicial Conference, Dec. 27, 1988) (reprimanding judge for "gratuitous statement" and "intemperate criticism" of complainant in course of court proceeding: "a judge may become so intemperate and inconsiderate as to warrant some reprimand from his fellow judges"); Phelps v. Kelly, Committee Memorandum and Order No. 87-372-001, at 7-8 (1987) (reprimanding judge for criticizing attorney in the course of a proceeding "in terms which were injudicious, intemperate and demeaning" of the attorney); In re Charge of Judicial Misconduct, Nos. 93-80015, 93-80288 (9th Cir. Judicial Council, August 20, 1994) (taking "appropriate disciplinary action" based upon judge's "intemperate and abusive remarks from the bench"); In re Judicial Complaint (11th Cir. Judicial Council, Oct. 8, 1990) (reprimanding as conduct prejudicial to the administration of justice a magistrate's decision to order the arrest of attorney who failed to appear in court because of a conflicting criminal trial); In re Judicial Complaint No. 82 (1st Cir. Judicial Council, July 18, 1989) (concluding that judge engaged in conduct "prejudicial to the administration of justice" by issuing an opinion which barred an attorney from practicing in his court; rule against review of "merits" of judicial decisions "does not license or insure statements having only a tenuous and wholly unnecessary connection with the disposition of the proceeding but, at the same time, the appearance if not the actuality of judicial conduct plainly in violation of applicable ethical standards").

involving review of matters "directly related to the merits" of Judge McBryde's "decisions" or "procedural rulings."

Finally, Judge McBryde has raised numerous objections to the efforts by the Special Committee to ascertain whether he may be suffering a mental disability. This objection will become moot if the Judicial Council adopts the recommendation of the Special Committee. We will briefly summarize why Judge McBryde's arguments were considered by the Special Committee to be without merit.

Pointing to the language of Section 372(b), Judge McBryde argued that before there could be any investigation as to whether he had a mental disability, there first had to be a conclusion that he was unable to carry out the duties of a district judge. We rejected that contention because nothing on the face of the statute requires such a procedure. Judge McBryde then argued that it is inappropriate for the Judicial Council to order, or to be involved in the process of deciding whether to order, an examination. The Special Committee rejected that position. The statute, Section 372(c)(1), provides on its face that the Judicial Council, through a Special Committee, can make such an investigation, even if the Judicial Council is precluded from taking action unless the standard of Section 372(b) is met. Not only does the statute on its face authorize a Special Committee to do so, there is a long tradition of federal judges undertaking these types of inquiries of Article III judges.[55] Given the present

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[55] In 1801, legislation provided that upon "satisfactory evidence" of "the inability of the district judge . . . to perform the duties of his office," the "circuit court" "shall" direct a circuit court judge to perform the district judge's duties "for and during the period the inability of the district judge shall continue." Act of Feb. 13, 1801, ch.4, § 25, 2 Stat. 89, 97. In 1809, Congress created a system wherein the federal marshal or district attorney could submit evidence of a district judge's disability to the appropriate Supreme Court justice; if the district judge was determined disabled, he was relieved of duties for the period of disability. Act of March 2, 1809, ch. 27, 2 Stat. 534. In 1850, Congress enacted legislation which remained in place for almost 70 years, providing for certification of the disability of a district judge by the clerk of the court to the circuit judge and the designation by the circuit judge of substitutes during the period of disability. Act of July 29, 1850, ch. 30, 9 Stat. 442. In 1919, Congress altered the system for dealing

statute, the long tradition of the involvement of the federal judiciary in such inquiries, and the authority of the Judicial Council under Section 332(d) to enter any order necessary and appropriate, we determined that the Council could enter an order requiring a federal judge to undergo an examination, so that the Council could have the benefit of professional expertise to augment its evaluation.

B. Recommendations

1. Should There Be an Order To Undergo an Examination

The Special Committee has given careful thought to whether it should recommend to the Council an order requiring Judge McBryde to undergo a psychiatric examination. After observing Judge McBryde and reading a number of records of trials over which he presided and hearing his testimony, it is clear to the Special Committee that Judge McBryde is focused on his judicial duties and performs certain of the duties of his office efficiently. Notwithstanding these observations, our concerns and the factual bases for these concerns are set forth in this Report.

One reason to order an examination — improvement of Judge McBryde's condition by treatment — finds little encouragement from Dr. Osofsky that treatment would benefit Judge McBryde. Judge McBryde is extremely hostile to any suggestion that he is suffering under any mental disability. He has repeatedly made it clear that he will resist to the utmost any suggestion that he should visit a psychiatrist or obtain treatment. Dr. Osofsky's report in this respect — which is based upon his observations during the nine days of hearings — states that Dr. Osofsky cannot predict the result of any treatment program. But

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with judicial disability and enacted legislation which authorized the President to certify that a federal judge was disabled and to appoint (with the advice and consent of the Senate) a new judge. Act of Feb. 25, 1919, ch. 29, sec. 6, § 260, 40 Stat. 1156, 1158. The current Section 372(b) of Title 28, enacted in 1957 (and not substantively modified since then), authorizes the President, upon the certification of a majority of a judicial council that a judge is permanently mentally or physically disabled, to appoint (with Senate confirmation) a new judge.

the report points out that, absent cooperation, the prognosis is guarded. We surmise that under the best of circumstances treatment for Paranoid and Narcissistic Personality Disorders (if indeed an evaluation established that Judge McBryde has this condition) is problematic. Common sense tells us that if Judge McBryde persists in refusing to recognize that he has a problem and resists treatment we have little chance that any treatment would be beneficial.

Dr. Osofsky emphasized in his report that any diagnosis would require a psychiatric history, a developmental history, family and social information, medical information, and a history of medications. Obtaining this type of highly personal information from a resistant individual seems inherently difficult to accomplish by means of a court order. We understand that, in a situation where the individual refuses to cooperate, the diagnostic process is itself more difficult and uncertain, to say nothing of the prospect for effective treatment.

The Special Committee firmly believes that requiring an Article III judge to submit to a psychiatric evaluation against his will is an extreme step and should be taken most reluctantly. So our conclusion that it is unlikely that we will derive concrete benefit from such an examination argues strongly against pursuing this feature of the investigation. Additionally, while the Special Committee feels that it has pursued the investigation as expeditiously as possible, satellite litigation has caused inordinate delays in the completion of our work. If we pursue this aspect of the investigation and require Judge McBryde to undergo a psychiatric examination, we can anticipate further delays and, given the coercive aspect of an examination, diminished prospects of a beneficial medical result.

In all the circumstances — Judge McBryde's refusal to cooperate, the guarded prognosis for treatment and difficulties of diagnosis associated with this refusal, and the need for closure in this proceeding — we have concluded that pursuing a forced psychiatric examination now would not be the most constructive and effective remedy for the problems we have identified.

2. Section 372(c): Conduct Prejudicial to the Effective Administration of the Courts

With respect to whether Judge McBryde has engaged in conduct prejudicial to the effective administration of the business of the courts, the Special Committee has determined that he has done so in numerous respects. As set forth in the Findings of Fact, many of these individual instances, together with the patterns demonstrated over the years surveyed, require these conclusions. Without purporting to assign relative importance, the Special Committee generally points to the following matters: the Fourth Floor Order; Judge McBryde's unfounded suspicions over the veracity of the attorneys; Judge McBryde's treatment of court personnel such as Nancy Doherty; Judge McBryde's humiliating treatment of attorneys and fellow judges, particularly Judge Lowe and Judge Mahon; Judge McBryde's imposition of draconian sanctions for minor transgressions; and Judge McBryde's overly strict adherence to rules at trial which prevented attorneys from effectively representing their clients.

The Special Committee finds that Judge McBryde has engaged for a number of years in a pattern of abusive behavior, which has brought disrepute upon the federal judiciary. Moreover, much of Judge McBryde's conduct is inconsistent with Canon 3(A)(3) of the Code of Conducts for United States Judges, which provides: "A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." Based on the foregoing, the Special Committee concludes that Judge McBryde has engaged in conduct which is "prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c). Judge McBryde's conduct is unacceptable and sanctionable under 28 U.S.C. § 372(c)(6)(B).

Notwithstanding our conclusion that further pursuit of an examination of Judge McBryde is not warranted, it is apparent to the Special Committee that Judge McBryde's tendencies to suspect the motives of others frequently impair his ability to evaluate good faith efforts on the part of lawyers and to fashion appropriate sanctions for perceived contemptuous conduct.

That impairment frequently adversely impacts on the ability of lawyers to properly represent their clients. Also, Judge McBryde's obsession with controlling the minutest details of trials impedes the lawyers' ability to develop and present their cases.

These conclusions persuade us that we should request that Judge McBryde voluntarily retire with full benefits in accordance with the provisions of 28 U.S.C. § 372(c)(6)(B)(iii), including waiver of the ten-year requirement. If the request is accepted by Judge McBryde, he can avoid sanctions by the Judicial Council and retire with the measure of dignity appropriate for the circumstances.

RECOMMENDATION NO. 1

The Special Committee recommends that before imposition of sanctions, the Fifth Circuit Judicial Council request, pursuant to 28 U.S.C. § 372(c)(6)(B)(iii), Judge McBryde to retire voluntarily with the provision that the Judicial Council shall recommend that the length of service requirements under 28 U.S.C. § 371 shall not apply. The Special Committee recommends that Judge McBryde must accept the Judicial Council's request by January 5, 1998.

In the event Judge McBryde declines an invitation to retire, then the matter of sanctions must be addressed. Judge McBryde, under these circumstances, must be evaluated as an individual who is responsible for his conduct, and his conduct is found by the Special Committee to be unacceptable as he has engaged in a course of conduct that amounts to a pattern of abusive treatment of those who appear before him and his fellow judges. Such conduct has brought disrepute upon the judiciary and has been prejudicial to the effective administration of the business of the courts.

RECOMMENDATION NO. 2

A. A public reprimand of Judge McBryde, as authorized by Section 372(c)(6)(B)(b)(i). The Special Committee recommends that appended to the public reprimand shall be a copy of this report, with the proviso that if the Judicial Council agrees with the recommendation of the Special Committee concerning the mental health issue, those portions of the report relating thereto (including so much of the background, the

discussion of Dr. Osofsky and his reports, and this section) be excised from the copy appended to the reprimand.

B. Ordering that no new cases be assigned to Judge McBryde for a period of one (1) year. The Judicial Council is specifically authorized by Section 372(c)(6)(B)(iv) to order that, on a temporary basis for a time certain, no new cases be assigned, as a sanction in a Section 372(c) proceeding. The Special Committee believes that no new assignments for this limited period is necessary and appropriate in view of the seriousness of the abuses we have found to have existed over a number of years; the fact that this abuse has run the gamut of cases over which he has presided; and the need for the federal courts to be seen to be concerned over, and to attempt to remedy, abuses that are found to exist in the Article III courts. Moreover, the Special Committee was struck that during the weeks of testimony, as incident after incident was recounted, by witness after witness who related the fear and distress generated by his conduct and actions, Judge McBryde evinced no reflection or remorse concerning the totality of his conduct. In the first days of the hearings, his counsel seemed to suggest that the incidents identified by the Committee were early in his tenure, thereby implying that he had moderated his behavior in later years. But as the evidence showed these patterns persisting to the present, even such indirect, tacit suggestion that he accepted responsibility disappeared. Aside from one or two instances (regrets for the initial Saulsberry sanction and for calling Judge Mahon "despicable"), Judge McBryde refused to acknowledge the impropriety of his actions. His repeated responses that his actions were proper and appropriate bespeak both of denial and the probability that, absent self-reappraisal, such conduct will not abate.

Depriving Judge McBryde of new assignments for this period will not prevent continued abuse, but it will provide him some opportunity for deep reflection, which is necessary and desirable. Moreover, as we have detailed, personnel within the court system, including staff such as Nancy Doherty and fellow judges, have been seriously abused. These interests, together with the interests of those institutional participants in the criminal justice system in Fort Worth, deserve to perceive that

tangible efforts will be made to discipline a judge for his abuse in an effective and highly visible fashion.

C. The entry of an order directing that Judge McBryde for a period of 3 years not participate in all cases pending (i) as of the date of the entry of such order and in which the attorneys listed below are currently involved and (ii) in all cases filed after the entry of such order in which the initial notice of appearance includes the attorneys listed below.[56] Under Section 372(c)(6)(B)(vii), the Judicial Council is authorized to impose any order on a judge that is necessary and appropriate in light of the factual circumstances. We believe that this order is warranted, if not compelled, by the factual circumstances. As we noted earlier in this Report, the Counsel for the Special Committee encountered reticence, if not reluctance, from persons who had experiences before Judge McBryde even to discuss incidents that were matters of record, let alone appear before the Special Committee. We believe that such reticence and reluctance was based upon a well-grounded apprehension that Judge McBryde might retaliate against those persons who testified.

In the course of this Report, we have set forth examples of conduct by Judge McBryde which, in our view, could reasonably be called retaliatory, including his behavior in the Torres matter (toward Ms. Doherty), in Dawson and Anderson (toward the AUSAs involved), in the Fourth Floor Order and the suggestion that Public Defender Matt Golla never again appear in his court, and in the Woods matter. As noted above, AUSAs Barta and Gartner testified that AUSAs Brown and Teakell fear that Judge McBryde may seek some sort of retribution against them for testifying in the present proceeding.[57] A stark example

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[56]Most of the attorneys listed below were subpoenaed and testified against Judge McBryde during the course of the evidentiary hearings. A few, although ultimately not called by Special Counsel to testify, were listed by Special Counsel as potential Committee witnesses (or were involved in events described) in notices provided to Judge McBryde prior to the hearings.

[57] As noted, while AUSA Gartner acknowledged that former AUSA Brown's concerns may be unfounded, they still illustrate the depth of fear caused by Judge McBryde's action in the Dawson matter.

of at least the perception that Judge McBryde would retaliate against lawyers is shown by the action of Judge Lowe of the Texas state court, who left his bench to come over to the federal court to explain personally to Judge McBryde the circumstances facing Mr. Gray.

Furthermore, less that three weeks ago, one of Judge McBryde's counsel filed a post-hearing motion directed at the submission of one person, terming it "illegal" and "unethical" and a violation of Judge McBryde's "rights" and "privacy." This motion was also served personally on that person. The Special Committee denied the motion without prejudice, but we were sufficiently concerned with the content and circumstances to observe that a person might conclude that an attempt to harass or retaliate against a witness in a federal evidentiary hearing may have occurred.[58] This direct experience with Judge McBryde's reaction to a witness who testified in connection with this investigation further informs our judgment.

If there is a possibility, as here, of retaliation, it is obvious to us that such can be done in subtle ways, especially to attorneys who are conducting a jury trial. We note again, as we explained above, that during the hearings Judge McBryde displayed no remorse for or reflection on most of these incidents, maintaining in effect that his conduct was at all times appropriate. This position strongly suggests that individual applications that he not preside will not be received for consideration by him from a de novo perspective. Moreover, Judge McBryde may simply be less sensitive to these concerns. We note that, when United States v. Satz was remanded to him, the panel suggested he consider the possibility that he recuse himself from further contempt proceedings against AUSA Cerow and Postal Inspec-

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[58] The post-hearing motion was directed at Dr. Osofsky and the report he issued based on his observations during the course of the evidentiary hearings. That report, described in Section V above, did not offer any diagnosis of Judge McBryde, but concluded that there "is cause for some concern" that "[o]nly a thorough medical and psychiatric evaluation can substantiate or rule out." The motion, including the characterizations set forth above and the demand that Dr. Osofsky retract his reports, clearly implied that legal action against Dr. Osofsky for assisting the Committee was contemplated.

tor Whiteaker. Judge McBryde, however, entered an order waiting until either of those parties made such a motion. Thereafter, however, Judge McBryde sat through these Section 372(c) hearings and heard Judge Rosenblatt testify that his sealing order was exactly as described by AUSA Cerow and that Judge Rosenblatt indeed did intend to preclude anybody, including Judge McBryde, from having access to that material. It would seem clear that Judge McBryde, who himself was a participant in a telephone conversation with Judge Rosenblatt as to which there is significant disagreement, cannot now preside in any other proceedings in this matter. Judge McBryde knows, through these proceedings, of Judge Rosenblatt's testimony; but AUSA Cerow and Postal Inspector Whiteaker are not aware either of that testimony or of Judge McBryde's knowledge thereof, because of the confidentiality of this proceeding. Nevertheless, Judge McBryde still has the contempt proceeding pending before him. We do not purport to recommend that the Judicial Council can or should do anything in United States v. Satz. We do believe, however, that Judge McBryde's recent behavior therein substantially supports the need and justification for this form of relief.

In sum, the Special Committee has the definite and firm conviction that the likelihood of retaliation by Judge McBryde over the short to intermediate time frame is substantial.

Finally, this order is required to protect the viability of the Section 372(c) process. The Special Committee requested testimony from a number of individuals who appeared before the Committee. In obtaining their testimony, the Committee was performing a task required by statute that is in the best interests of, among others, the federal judiciary. The Committee is entitled to obtain the truth. The persons listed have appeared or may appear on a regular basis in cases before Judge McBryde. By testifying in a manner adverse to a judge, these attorneys and their clients are at risk of potential retaliation. A witness in a Section 372(c) proceeding should not fear the prospect of telling the truth. In order to be able to obtain the truth to fulfill its obligations, the Judicial Council must be able to protect those who are asked to or required to provide evidence in those instances, which we hope are few, where

retaliation is likely. Having put these listed persons in potential jeopardy in its efforts to obtain the truth, the Council has the authority and the responsibility to take action to protect them.

Although certain of the individuals listed below come from the Public Defender and United States Attorney's Offices in Fort Worth, certain of the individuals are now in administrative positions, are leaving their current positions or rarely try cases before Judge McBryde (in particular Paul Stickney, Ira Kirkendoll, Matthew Golla and Marc Barta) and there are additional personnel in those offices. Others of the individuals are not now presently practicing in the Fort Worth area (Michael Sanders, Tim Henry, Dominic Gianna, and John Teakell) but conceivably could have occasion in the future to practice there. For these reasons, in the particular circumstances of this case, the Special Committee believes that this order is necessary and appropriate.[59] The individuals are:

Jay K. Gray	Matthew Golla	David Martin
Peter Fleury	Tim Henry	Frank McCown
Paul Stickney	Dominic Gianna	John Teakell
Arch McColl	Ira Kirkendoll	Michael Sanders
Richard Roper	Marc Barta	Paul Gartner
Michael Heiskell	Art Brender	Wayne Hughes
Claude Brown	Michael Snipes	Chris Milner
William Martin	Fred Schattman	

[59] The Special Committee does not know the extent to which any of the listed persons have pending cases before Judge McBryde, have moved for recusal, the result thereof, and the status of pending appellate activity, if any. We do not suggest that this portion of the recommended order would or could displace any pending appeal.

Dated: December 4, 1997

Respectfully submitted,

Chief Judge Henry A. Politz
Judge W. Eugene Davis (Chairman)
Judge Robert M. Parker
Judge William H. Barbour, Jr.
Judge Edward C. Prado

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Department of Psychiatry

November 4, 1997

Gregory A. Nussell,
Circuit Executive, New Oleans, LA **Via FAX: 504/589-2722**

Henry A. Politz, Chief U.S. Circuit Judge, Shreveport, LA
W. Eugene Davis, U.S. Circuit Judge, Lafayette, LA
Robert M. Parker, U.S. Circuit Judge, Tyler, TX
William H. Barbour, Jr., District Judge, Jackson, MS
Edward C. Prado, District Judge, San Antonio, TX

Dear Mr. Nussell and Honorable Judges:

I am enclosing my report related to the hearing in the matters involving United States District Judge John H. McBryde. As I explain in the attached, these are my impressions and inferences as a consultant to the hearing panel from attending nine days of hearings in New Orleans and in Fort Worth.

Please feel free to contact me if you have -questions or wish me to provide anything additional.

Sincerely,

/s/
Howard J. Osofsky, M.D, Ph.D.
Professor and Chair

HJO:rc

Summary of my opinions related to the Hearing Before the Special Investigatory Committee

Date: October 20, 1997

To: Henry A. Politz, Chief U.S. Circuit Judge, Shreveport, LA
W. Eugene Davis, U.S. Circuit Judge, Lafayette, LA
Robert M. Parker, U.S. Circuit Judge, Tyler, TX
William H. Barbour, Jr., District Judge, Jackson, MS
Edward C. Prado, District Judge, San Antonio, TX

Re: Matters Involving United States District Judge John H. McBryde, Northern District of Texas, Under the Judicial Conduct and Disability Act of 1980

Prepared by: Howard J. Osofsky, M.D., Ph.D., Professor and Chair-Department of Psychiatry Louisiana State University Medical Center

This summary of my impressions and inferences as a consultant to the hearing panel results from attending nine days of hearings in the above referenced matter, from August 25, 1997 to August-29, 1997 in New Orleans and then from September 29, 1997 to October 2, 1997 in Fort Worth, Texas.

As I stated from the outset, it would be neither possible nor ethical for me to attempt to make a psychiatric diagnosis on the basis of such an observation. Indeed, I would emphasize that it is unethical and inconsistent with standards of practice to make a psychiatric diagnosis from mere observation. I have not examined Judge McBryde and a full examination would be necessary for me to arrive at any diagnosis. Further, I have not obtained a psychiatric history, developmental history, family and social information, medical information, and a history of medications; nor have I had access to any other evaluations that may have been carried out in the past. As per the initial agreement, I have also not received information that may have been gathered previously during the investigations leading up to these

hearings. Therefore, I have attempted to move along parallel with the actions unfolding during the hearings which I attended, utilizing my experience as a doctor - and especially as a psychiatrist -- in making observations and in thinking through the incidents and circumstances described. I have tried formulate my thoughts in a careful manner given the complexity and the gravity of the concerns. In advance' I am aware that some of the questions I will raise may not have relevance to the legal system. Other questions may be more relevant, and I am hopeful that they will be of use to the Special Investigatory Committee in their deliberations.

During my days of observation, I was impressed with many things that I would consider admirable about Judge McBryde. He clearly is an intelligent, focused, and dedicated individual. At all times he was keenly observant of the proceedings and involved with his attorneys. From my perspective, Judge McBryde came across as an imposing figure, with serious demeanor and generally controlled expressions, although there were occasions when he demonstrated anger, impatience, and somewhat sarcastic wit.

However, during the course of the hearings I became progressively concerned about a number of areas. Witnesses' testimonies as well as material entered as exhibits, indicate that Judge McBryde has apparently made a number of decisions which could be perceived as rooted in arbitrariness, suspiciousness, anger, arrogance, and contempt. There further emerged a sense that, in a number of his behaviors and decisions, he has been relatively unempathic to the effect of these behaviors and decisions on colleagues and lawyers appearing before him. Especially with lawyers, he has not appeared to take fully into account the impact of his decisions upoxi their self-esteem and even their careers. I found myself concerned about Judge McBryde's apparent failure either to consider other options or, after time for reflection, to reconsider his course of action. Certainly, I would not be surprised to learn that a particular judge in some isolated circumstance had overreacted, with his or her behavior impacting negatively upon decision-making at

that specific time. However, the instances to be considered by the Special Investigatory Committee have occurred repeatedly over a period of years. Furthermore, although Judge McBryde has described some situations where in retrospect he may have made different decisions given his growing experience, in general he has come across as feeling justified relative to most of the worrisome areas, showing little sense of reflective reconsideration about his behaviors and decisions.

Over the course of the hearings, I had growing concerns about Judge McBryde's being arbitrary, distrustful, and suspicious of colleagues and lawyers appearing before him. He has interpreted motives as malevolent when they have not appeared so intended. Repeatedly he has conveyed his belief that others wish to deceive him, convinced of both public defenders' and U.S. attorneys' not being fully candid with him. He has appeared overly concerned about loyalty and trustworthiness of associates, reacting with anger and attacks either to deviations on their part or to his perceptions of being devalued or insulted. The offense of disobeying or appearing discourteous to the court has seemed to outweigh all other considerations including those related to lawyers' realistic inability to comply with his orders, their trying to behave ethically and their wishing to represent their clients fully. Judge McBryde has justified as educational an apparently arbitrary punishment of the entire group of public defenders for a mistake of one attorney in that office. Even if unintentional on his part, testimony of colleagues, lawyers appearing before him, and his own statements indicate an apparent arrogance, an expectation of special treatment, and some lack of sensitivity to the concerns of others.

Finally, I must reiterate that this report is a summary of my impressions and inferences and that it would be inappropriate for me to make psychiatric diagnoses on the basis such an observation. However, witnesses' depictions of Judge McBryde, material entered as exhibits, and Judge McBryde's testimony, together provide a picture that is cause for some concern. A number of the behaviors and reactions described are consistent with those that are commonly observed in individuals suffering

from psychiatrically defined Paranoid and Narcissistic Personality Disorders. They are also consistent with a variety of medical problems -- side effects of medications, injuries, alcohol or other substance abuse, and neuropsychiatric conditions. Only a thorough medical and psychiatric evaluation can substantiate or rule out such conditions.

If there are additional questions or if I can be of further help, please let me know.

November 10, 1997

Howard J. Osofsky, M.D., Ph.D.
Professor and Chair
School of Medicine in New Orleans
1542 Tulane Avenue
New Orleans, LA 70112-2822

Dear Dr. Osofsky:

Re: Judge John M. McBryde

The Special Investigating Committee asks that you please supplement your report by answering the following question:

> If you assume that a thorough medical and psychiatric evaluation establishes that Judge McByrde is suffering from Paranoid and Narcissistic Personality Disorders, based upon what you have observed and learned from your participation in this matter, what are the prospects that such disorders can be successfully treated in Judge McBryde's case?

Sincerely,

/s/
W. Eugene Davis, Chairman
Special Investigating Committee

cc: Chief Judge Henry A. Politz
Judge Robert M. Parker
Judge William H. Barbour, Jr.
Judge Edward C. Prado
Mr. Gregory A. Nussel
Mr. Robert H. Fiske, Jr.
Mr. William H. Jeffress, Jr.

SCHOOL OF
MEDICINE IN NEW ORLEANS
Louisiana State University
Medical Center
1542 Tulane Avenue
New Orleans. LA 70112-2822
Telephone: (504) 568-6001
FAX: (504) 568-8647

Department of Psychiatry

November 17, 1997

VIA FAX. 504/589-2722

Mr. Gregory A. Nussel
Circuit Executive
United States Court of Appeals
600 Camp Street
New Orleans, LA 70130

Dear Mr. Nussel:

Attached is my response to Judge Davis's question (see his letter dated November 1O, 1997) in the matters involving U.S. District Judge John H. McBryde.

Please do not hesitate to contact me if you have questions or need anything farther.

Sincerely,

/s/
Howard J. Osofsky, M.D, Ph.D.
Professor and Chair

HJO:rc

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Department Of Psychiatry

November 17, 1997

W. Eugene Davis, Chairman
Special Investigating Committee
United States Court of Appeals
556 Jefferson Street, Suite 300
Lafayette, LA 70501

Re: Judge John M. McBryde

Dear Judge Davis:

In response to your letter of November 10, 1997, 1 would first emphasize that my answer to your question must remain somewhat hypothetical in that I have not carried out a psychiatric and medical evaluation of Judge McBryde, and therefore can neither attempt to make a diagnosis nor formulate prognostic outcomes. However, as I also noted, the behaviors that were described by witnesses as noted in exhibits and in examination and cross examination of Judge McBryde, are consistent wit h those that are commonly observed in persons suffering from psychiatrically defined Paranoid and Narcissistic Personality Disorders. If, after adequate evaluation, these diagnoses are ultimately made, they, by themselves, do not fully predict either the most desirable course of treatment or the ultimate outcome for a given individual. Many factors that would be elucidated during the course of a full evaluation would help in determining the treatment to be recommended and the likelihood for success of the prescribed treatment. However, it should be noted that an

important factor in determining the prognosis in a matter such as this would be the individual's recognition, appreciation, and acknowledgment of the circumstances that have led to the concerns of the Special Investigating Committee. An additional important factor in determining the prognosis in a case such as this would be the individual's willingness to participate in treatment. Without such appreciation and willingness to participate in treatment, the prognosis is very guarded.

Please do not hesitate to call me if you have questions or need additional information.

Sincerely,

/s/
Howard J. Osofsky, M.D, Ph.D.
Professor and Chair

HJO:rc

APPENDIX F

United States Court of Appeals
for the District of Columbia Circuit

Filed February 1, 2002

No. 00-5016

THE HONORABLE JOHN H. MCBRYDE,
UNITED STATES DISTRICT JUDGE FOR THE
NORTHERN DISTRICT OF TEXAS,
APPELLANT,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND
DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES, ET AL.,
APPELLEES.

BEFORE: GINSBURG, *Chief Judge*, EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

ORDER

Appellant's petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

Circuit Judges SENTELLE, ROGERS and TATEL would grant the petition for rehearing en banc.

A statement of *Circuit Judge* TATEL dissenting from the denial of rehearing en banc, in which *Circuit Judge* SENTELLE joins, is attached.

Circuit Judges EDWARDS, RANDOLPH and GARLAND did not participate in this matter.

TATEL, *Circuit Judge*, with whom SENTELLE, *Circuit Judge*, joins, dissenting from denial of rehearing en banc:

In my view, this case warranted *en banc* review because the panel's decision conflicts with well-established precedent of both the Supreme Court and this circuit. In *Webster v. Doe,* the Supreme Court held "that where Congress intends to preclude review of judicial claims, its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." 486 U.S. 592, 603 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). *See also Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 494-95 (D.C. Cir. 1988); *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981); *Ralpho v. Bell*, 569 F.2d 607, 620-21 (D.C. Cir. 1977). Here, the panel reads section 372(c)(10) to preclude review of Judge McBryde's as-applied constitutional claims even though the statute contains no language expressly barring review, and even though the legislative history may as easily be read to permit as to preclude federal court jurisdiction over such challenges. *See McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 73-76 (D.C. Cir. 2001) (Tatel, J., dissenting). According to the panel, the purported "substantial redundancy" between review by an Article III court and by the Judicial Conference reflects Congress's intent to

preclude review of as- applied constitutional claims. *Id.* at 62. This position, however, rests not on primary evidence from the legislative history itself, but on a secondary inference drawn from the structure of the Act, and thus does not amount to the kind of "clear and convincing" evidence required by the Supreme Court and this circuit. *See Johnson v. Robison*, 415 U.S. 361, 371-75 (1974) (limiting its analysis of legislative history to affirmative statements of congressional intent); *see also Griffith*, 842 F.2d at 494-95 (same); *Ungar*, 667 F.2d at 193-96 & 195 n.2 (same); *Ralpho*, 569 F.2d at 620-22 (same). I respectfully dissent from the denial of rehearing *en banc*.

APPENDIX G

Excerpts From the Constitution of the United States

Article I, § 2, cl. 5

> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article I, § 3, cl. 6

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Article I, § 3, cl. 7

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Article I, § 5, cl. 1

> Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Article I, § 5, cl. 2

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Article II, § 2, cl. 2

> He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two

thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, § 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

amend. XXV, § 4

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the power and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

APPENDIX H

Judicial Conduct and Disability Act of 1980, as amended (28 U.S.C. § 372(c))

Title 28, § 372(c) of the United States Code:

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may –

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly –

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

A judge appointed to a special committee under this paragraph may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371(a) of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council –

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title;

(C) may dismiss the complaint; and

(D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the

council, that a judge appointed to hold office during good behavior may have engaged in conduct –

(i) which might constitute one or more grounds for impeachment under article II of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8)(A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that--

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel

concludes that the complainant could offer substantial information.

Any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this subsection may limit the period of time within which a person may file a complaint under this subsection.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that--

(A) the judicial council of the circuit in its discretion releases a copy of a report of a special investigative committee under paragraph (5) to the complainant whose complaint initiated the investigation by that special committee and to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6) (B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

(17) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(18) The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

APPENDIX I

United States Court of Appeals,
Fifth Circuit.

In re John H. McBRYDE, U.S. District Judge, Petitioner.

No. 95-11082.

Decided July 2, 1997

Before HIGGINBOTHAM, EMILIO M. GARZA and DENNIS, *Circuit Judges*.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

This petition arises out of the reassignment of two cases once pending before Judge McBryde in the Northern District of Texas. The two cases were styled *United States v. Michael Eric Satz* and *Sanjuana Torres, et al. v. Trinity Industries, Inc.* Judge McBryde requested the Judicial Council of the Circuit to invalidate these two reassignments. The Council found that "Judge Buchmeyer's factual predicate, on which he based his orders, was correct" and ultimately ordered their reassignment by its own order. Judge McBryde then filed a petition for mandamus with this court. The petition raises difficult questions of jurisdiction and carries us into uncharted waters of superintendence of Article III judges. We begin with a description of the two cases. We then return to the procedural history of the petition for mandamus and the action taken by the Council. Finally, we examine our jurisdiction and then the merits of Judge McBryde's petition.

I

A

Michael Satz was part of an organization that fraudulently offered loan referral services to individuals with poor credit ratings. The scheme made money by charging the

individuals a referral fee in advance, with "boilerrooms" operating in several states.[1]

Grand juries in both Phoenix, Arizona, and Fort Worth, Texas, indicted Satz. The Phoenix case was assigned to Judge Paul G. Rosenblatt, and the Fort Worth case by random assignment to Judge McBryde. The Phoenix case reached trial first in late 1994. Satz was convicted and taken into custody, and Judge Rosenblatt eventually scheduled sentencing for May 15, 1995. Shortly thereafter, a Northern District of Texas jury also convicted Satz, and Judge McBryde scheduled sentencing for April 28, 1995.

Investigations into the boilerrooms continued. In early 1995, Phoenix Assistant United States Attorney Darcy Cerow convened a grand jury, which began further investigations into Satz and three of his alleged co-conspirators: Lester Schwartz, Anthony Peter Schwartz, and Robert Schwartz. After extended negotiations, on March 27, 1995, the Schwartzes pled guilty before Judge Rosenblatt to certain crimes arising out of their boilerroom activities. In their plea bargains, the Schwartzes agreed to cooperate with law enforcement authorities in the continuing investigation of the boilerrooms. At the plea proceeding, the following colloquy occurred:

The Court: Anything further for the record?

Ms. Cerow: Your Honor, two things. One, I believe we need a number for the information.

The Clerk: CR 95-79.

The Court: Oh, yes.

The Clerk: They need to move to seal.

The Court: The motion to seal is granted.

The criminal minutes of the docket entries corresponding to each of the Schwartz cases, which apparently have been available to the public throughout the pendency of this affair, reflected the fact that the Schwartzes had pled guilty and stated, "govt's oral m/ seal granted."

---

[1]The facts behind Satz's criminal enterprise are examined in more detail in *United States v. Gray*, 105 F.3d 956, 961-62 (5th Cir.), *cert. denied*, 520 U.S. 1150, 117 S.Ct. 1326, 137 L.Ed.2d 487 (1997); 520 U.S. 1246, 117 S.Ct. 1856, 137 L.Ed.2d 1057 (1997).

AUSA Cerow then contacted Northern District of Texas AUSA Phillip Umphres regarding the *Satz* case. According to testimony she later gave before Judge McBryde, Cerow told Umphres of Judge Rosenblatt's sealing order and of the ongoing investigation. In particular, Cerow related that the Phoenix investigation had produced documents suggesting that Satz's involvement in certain boilerrooms was more extensive than enforcement authorities in either Arizona or Texas had previously believed. If verified, the information would lead to a longer sentence for Satz. The testimony of AUSAs Cerow and Umphres conflicted regarding the extent to which Cerow informed Umphres of the government's position regarding the scope of Judge Rosenblatt's sealing order.

On April 4, 1995, AUSA Umphres moved to continue Satz's Texas sentencing until June 23. This motion was not under seal. The motion asked Judge McBryde to continue the sentencing then scheduled for April 28 for three reasons. The first was a problem of logistics. Satz was currently held in Arizona and had a sentencing scheduled there in May. The second was that AUSA Cerow was continuing the Arizona investigation into Satz's boilerroom activities and his association with certain co-conspirators, which the motion identified as the Schwartz family. The motion recited that the information thus far generated suggested that Satz may have been a bigger player in the boilerrooms than had previously been believed and that he may have committed perjury at his Texas trial. The motion further stated that AUSA Cerow planned to continue the investigation by asking an Arizona grand jury to subpoena bank records and live witnesses, perhaps leading to the prosecution of other unnamed individuals. The third reason to continue Satz's sentencing was that the Arizona and Texas pre-sentence reports calculated Satz's offense levels in part using some of the same conduct. A good faith argument existed that this double-use constituted double jeopardy. The Fifth Circuit had already held that this double-use did not violate double jeopardy principles. The Ninth Circuit had not yet decided the question. Thus scheduling the Texas sentencing after the Arizona sentencing would finesse any double jeopardy contention Satz

might later make. The motion did not mention Judge Rosenblatt's sealing order as a reason to continue sentencing.

Meanwhile, Satz had difficulty getting to Fort Worth for his scheduled sentencing. He filed a motion to be transferred to Fort Worth with the Arizona district court, which Judge Rosenblatt denied on April 17. At the eventual hearings in his court, Judge McBryde stated that upon receiving notice of this order, he called Judge Rosenblatt and got him to agree to transfer Satz to Fort Worth.

On April 18, Judge McBryde denied AUSA Umphres' motion to continue Satz's Texas sentencing. The denial order stated, "[t]he contents of the motion of the United States of America indicates that the government has additional information concerning the activities of defendant MICHAEL ERIC SATZ ('Satz') that could have relevance to the sentencing of Satz." Judge McBryde ordered the United States to deliver a supplementary written report to the Probation Office detailing all such relevant information and requested the Probation Office to write an addendum to the PSR.

On April 21, AUSA Umphres filed under seal a renewed motion to continue sentencing along with five exhibits. Again, the text of the motion itself did not mention a sealing order. Instead it stated that Umphres had delivered some material to the Probation Office, but that this material was cumulative to documents that office already possessed. Further documents remained in Arizona, but AUSA Umphres did not know of their exact contents. These documents suggested Satz's involvement in additional boilerrooms, but the information was as yet uncorroborated, and the Arizona investigation was continuing. According to the motion, "disclosure of the information set out in Exhibit A at this time [would] jeopardize [the] on-going grand jury investigation [in Arizona]." The motion to continue sentencing also asked Judge McBryde to order the Probation Office to keep all information secret from defendant Satz.

A memorandum from Umphres to the Probation Office was attached. It stated that AUSA Cerow had reached plea agreements with certain individuals above Satz in the boiler-room operation, and that these individuals had since been "debriefed." The memorandum explained that Cerow had

informed Umphres "that the plea agreements and factual resumes relating to the defendant have been filed under seal as [Cerow] wanted to keep the fact of their cooperation secret [from Satz] for the moment in order to avoid alerting other targets of her investigation, who[m] she did not identify." Finally, the memorandum stated that Postal Inspector Rex Whiteaker once possessed certain information, but that Cerow had asked Whiteaker to send all documents in his possession to Arizona and had told him that all information was covered by the grand jury secrecy rules embodied in Fed.R.Crim.P. 6(e).

Umphres also attached as an exhibit a letter dated April 20 from Cerow to Umphres that again emphasized the continuing grand jury investgation and the Rule 6(e) concerns about disclosing information. This letter, which did not mention a sealing order, included the following paragraph:

> If, through an order of the court, we were to invade the secrecy of the grand jury investigation at this time, the investigation would be severely compromised. Although the targets are probably aware of the investigation, they do not know the extent of the grand jury's knowledge of their activities. If the investigation were to become a matter of public record, the targets would be in a position to destroy documents, move assets to avoid forfeiture, and flee the country to avoid prosecution. These acts would essentially bring the grand jury investigation to a halt which would result in the non- prosecution of key players.

Later in the day on April 21, Judge McBryde ruled upon AUSA Umphres' latest motion. The order stated, "The material provided in the [government's] report and its attachments strongly indicates that one or more representatives of the United States of America has engaged in conduct calculated to frustrate the objectives of sentencing in this action and to cause noncompliance with the order signed by the court in this action on April 18, 1995." The order did not indicate that the government had raised the issue of the sealing order. Judge McBryde instructed AUSA Cerow, Postal Inspector Whiteaker, and defendant Satz to appear at an April 24 hearing and for the former two to bring with them all information potentially relevant to Satz's sentenc-

ing. The order stated that at the hearing the court would determine whether to proceed *in camera*.

On April 24, Judge McBryde began the first of three days of hearings on the *Satz* matter prior to sentencing. AUSA Cerow appeared with counsel from the Justice Department along with Inspector Whiteaker and defendant Satz. At this first hearing, Judge McBryde made clear his view that the government was attempting to manipulate the order of the Arizona and Texas sentencings in order to avoid double jeopardy problems. Judge McBryde ordered AUSA Cerow to turn over all information potentially relevant to sentencing Satz. In response, Cerow stated that three categories of information existed. The first was information generated in relation to a search warrant in Arizona. The second was information protected by the secrecy requirement of Rule 6(e). The third was information covered by a sealing order entered by Judge Rosenblatt. Cerow turned over the information in the first two categories. But she declined to provide information in the third category and stated that she had not brought those documents from Arizona. Citing Judge Rosenblatt's sealing order, Cerow's attorney also declined on her behalf to comply with Judge McBryde's order. Inspector Whiteaker refused to comply as well and referred the court to the sealing order and to Cerow's previous instructions that he send all information in his possession to Arizona. Cerow's attorney told Judge McBryde only that the sealing order was written and dated March 27.

According to Judge McBryde, this was the first he had heard of any sealing order. He asked why Judge Rosenblatt had entered it and what its contents were. Cerow and her attorney responded that answering either question would violate the sealing order. When Judge McBryde pressed to know the contents of the sealing order itself, Cerow's attorney responded that he had asked Judge Rosenblatt earlier that day to make available a redacted copy of the order, but that Judge Rosenblatt had refused to do so. Cerow and her attorneys repeatedly suggested that Judge McBryde call Judge Rosenblatt directly; Judge McBryde declined, stating "it's to the point where I should not bein the position [of] trying to persuade Judge Rosenblatt to do things." Judge McBryde concluded the April

24 hearing by suggesting his inclination to issue a show-cause criminal contempt order against Cerow or to dismiss the charges against Satz, or both.

The next day, April 25, Judge McBryde resumed hearings. He ordered Inspector Whiteaker to tell him who was present at the hearing when Judge Rosenblatt issued the sealing order. Inspector Whiteaker declined, citing the sealing order. Judge McBryde moved to a session *in camera*, ordered Satz and his attorney from the courtroom, and directed Cerow's attorney to tell the court more about the sealing order. Cerow's attorney stated that the order was written, was dated March 27, and was not entered in the Arizona *Satz* case. Cerow stated that the order had already prevented Judge McBryde from seeing information pertinent to Satz's sentencing. When Judge McBryde asked for further information, including the wording of Judge Rosenblatt's order, Cerow and her attorney also declined to answer. They stated that they had called Judge Rosenblatt the previous morning and asked him to release the sealed documents but that the Arizona judge had declined to make any information, including the wording of the sealing order, available for use in Fort Worth. After expressing his disappointment that the government had made no formal motion in Arizona to have the information released, Judge McBryde questioned Texas AUSA Umphres. Umphres disclosed that the Schwartzes, who had been mentioned in Satz's trial before Judge McBryde, were three of the targets of the investigation continuing in Arizona, and that certain defendants had pled guilty and were cooperating with the government. Umphres also stated that although he had known of the existence of a sealing order since early April, he had not known until the previous week that the Arizona U.S. Attorney's office was taking the position that the sealing order was as sweeping as AUSA Cerow's refusal to answer questions suggested.

Judge McBryde then moved back into public session and stated his belief that had there been a sealing order of the kind described by Cerow, he would have heard about it before the hearings began. Cerow responded that she had told Umphres of the order in early April, and that in her view the disclosure of information contained in Umphres' first motion for a continu-

ance, filed on April 4, itself violated Judge Rosenblatt's sealing order. Judge McBryde ordered a short recess.

When Judge McBryde resumed the hearings, Cerow's attorney stated that he had called Judge Rosenblatt again in an attempt to obtain confirmation on the sealing order. Judge Rosenblatt had apparently complied and faxed a short statement, the text of which read:

> On March 27, 1995, a criminal proceeding relating to a Northern District of Texas, Ft. Worth Division, 4:94-CR-094A, [sic] was filed in this Court. All matters pertaining to that proceeding were placed under seal by this Court and will so remain.

Judge McBryde responded to this fax with the following comment: "It's so vague and general it doesn't tell me any more than I've already learned from the people here. It doesn't tell me that that order is of such a character that it would be intended to override the provisions of the [Sentencing G]uidelines and of [18 U.S.C. § 3661] concerning sentencing information I'm required to have for sentencing purposes."

At some point on April 25, Judge McBryde received an additional fax from Judge Rosenblatt. In this letter, Judge Rosenblatt addressed Judge McBryde as follows: "[I]f you decide to go forward with the sentencing, under the circumstances, please keep in mind that eventually [Satz] will be returned to [Phoenix] for sentencing and whatever you do might have ramifications on my sentence. I ask you to please consider this and not jeopardize my case or any other proceedings pending in my court" (alterations added). Also on April 25, Judge McBryde again ordered Cerow to release the same information to the Fort Worth probation office. This order included a finding of fact that no sealing order preventing the disclosure of this information existed. In making this finding, Judge McBryde stated that he had relied upon the demeanor of AUSA Cerow and Inspector Whiteaker, the discrepancies in their testimony, the lateness of their reliance upon the sealing order as a reason to continue Satz's sentence, and the inherent implausibility of the proposition that one federal district judge would prevent another from using relevant information at a criminal sentencing.

Hearings resumed on April 26. After some further conversation, Judge McBryde stated that he interpreted Judge Rosenblatt's latest fax as verification that those in Phoenix were attempting to manipulate the order in which Satz was sentenced to prevent Satz from invoking double-jeopardy principles. After further discussion, Judge McBryde ordered the text of Umphres' second motion to continue sentencing unsealed and revealed to Satz and his counsel. The unsealing order reached the information filed under seal on April 21, including the attached exhibit disclosing the Schwartzes' guilty pleas and agreements to cooperate with the government to further the Arizona criminal investigation. The United States filed an emergency motion to stay the unsealing order, which this Court denied. Judge McBryde concluded the hearings with the following statements:

> I find that Darcy A. Cerow is in contempt of court in a number of respects. I find that she intentionally frustrated the objectives of my [April] 18, 1995 order directing that any additional information that has the potential to affect the sentencing of Satz, such additional information be delivered to the probation officer....
>
> I find that Darcy A. Cerow is in contempt of court for causing a violation of the April 21, 1995 order of the court which directed that the United States of America have present at the hearing held in this action on April 24, 1995, all information that is potentially relevant to the sentencing of Satz in this action. The record reflects that she had possession and control of information that was potentially relevant to the sentencing of Satz in this action, and she consciously did not produce it.
>
> I find that Darcy A. Cerow is in contempt of court for failing to comply with the (a) part of the order I signed yesterday, April 25 [because of the same conscious choice not to produce].
>
> . . . . .
>
> I find that Darcy A. Cerow is guilty of contempt of court because of her failure to answer questions she was ordered to answer during the course of the proceedings.... I find ... that the contention by Ms. Cerow that she was prohib-

> ited by a secrecy order [from following the above orders] is a fabrication and is not true....
>
> I don't believe Ms. Cerow believes that any order that has been entered that prohibits her from delivering that information. I find that she does not believe that any order prohibited her from complying with my orders.
>
> . . . . .
>
> The overall record reflects that all of this conduct and the waste of time we've had this week and leading up to this week has been a desire on the part of Ms. Cerow to have sentencing occur in the case in which she's a prosecutor first.... She's engaged in elaborate sets of activities in an effort to accomplish that, and in the course of doing so has engaged in falsehood and deception.

Judge McBryde concluded the hearing with a suggestion that the United States pursue an investigation of Cerow's conduct. The next day, Judge McBryde conducted Satz's sentencing hearing but did not sign a final judgment of sentence.

B

In October of 1990, a civil suit styled *Sanjuana Torres, Individually and ... (Grecia Torres, A Minor) v. Trinity Industries, Inc.* by random assignment fell to Judge McBryde. The suit arose out of the death of Mr. Raimundo Torres, Grecia Torres's father. The parties settled, and Judge McBryde signed a final judgment on December 20, 1991. Judge McBryde ordered the defendant to pay $40,000 to Grecia Torres. The final judgment also ordered the Clerk of the Northern District to "invest the amount deposited in an interest bearing account at the highest available rate of interest" until Grecia Torres reached majority.

The clerk's office did not follow this order. The plaintiff's attorneys informed a financial deputy for the district court that depositing the funds in the U.S. would have adverse tax consequences for Grecia Torres and asked that the clerk hold the funds until the attorneys could set up a Mexican trust fund. Neither the attorneys nor the deputy followed up on this plan, and the $40,000 stayed in the court's treasury for more than three years earning no interest. Intervening audits of the clerk's office's accounts did not uncover the mistake. Nancy Doherty,

Clerk of the Northern District, testified at the eventual hearing of the Fifth Circuit Judicial Council's Special Investigative Committee that her office discovered the mistake in early March, but that she first contacted the Administrative Office of the United States Courts to find a solution to the problem before writing to Judge McBryde. On March 24, 1995, Clerk Doherty informed the attorneys for Grecia Torres of the error in writing and sent a copy to Judge McBryde. By this time, the Administrative Office had suggested that Grecia Torres' only remedy was through the Federal Tort Claims Act. That process would take approximately ten weeks.

Six days later, Judge McBryde issued an order in the Torres case. He explained that he did not agree that the FTCA was Grecia Torres' exclusive remedy:

The court is disappointed that there would even be a suggestion that Grecia Torres, a minor, acting through a person or persons who might legally be qualified to act on her behalf, would be required to go to the time and expense to exhaust administrative remedies, through a tort claims process, before being able to obtain relief from violation of an order of this court.... If such order of this court is to have any integrity, enforcement of the order should be the means of causing Grecia Torres to be made whole for loss resulting from violation of the order (assuming that the clerk is unwilling or unable on her own initiative to take proper corrective measures by causing a sufficient deposit to be made to the minor plaintiff's account).

Judge McBryde's order directed Clerk Doherty to file an analysis and supporting documents to determine the amount of interest Torres had lost.

At the suggestion of Judge Buchmeyer,[2] Clerk Doherty responded by letter to Judge McBryde, attaching the requested financial information. Following his suggested language, despite her stated reservations that the phrasing would anger the court, the letter expressed shock and disappointment that Judge McBryde felt it necessary to enter an order to resolve the matter. The letter also informed Judge McBryde that the Clerk's office, the Administrative Office, and the plaintiff's attorneys were working together to reimburse Torres' account via an FTCA action. According to Clerk Doherty, Grecia Torres's interest income would have been between $3,762.68 and $8,112.58, depending on how the clerk's office had decided to invest.

On April 25, Judge McBryde responded with a second order. This order labeled Clerk Doherty's letter in response "so unprofessional and so disrespectful of the undersigned judge and court, and manifest[ing] such a high level of insolence, that it borders on, if it does not constitute, contempt of court by one of its statutory officers." In a long footnote, the order accused Doherty of "insolence," "lack of respect," attempting to "avoid direct confrontation of the consequences of noncompliance with the judgment," and a "lack of understanding [of] the court's responsibilities." The order further suggested that Doherty was "collaborating with the attorney for the plaintiffs in pursuing a remedy that ... the court considers to be inappropriate." The order concluded by striking Doherty's last letter and ordering her to file into the *Torres* record additional documentation designed to calculate the amount of interest income lost to the Torres account.

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[2]Chief Judge Buchmeyer's memorandum opinion in *Torres* indicated that he had become aware of the case when Clerk Doherty came to him seeking advice in how to respond to Judge McBryde's March 30 order. The Chief Judge also stated that he became aware of the *Satz* case when members of a United States Attorney's office approached him to ask his assistance in having an appellate judge available to consider an application for a writ of habeas corpus directing the release of AUSA Cerow, should Judge McBryde hold her in contempt.

C

1

On April 27, Judge Buchmeyer, Chief Judge of the Northern District of Texas, entered orders vacating Judge McBryde's order of April 25 and reassigning the *Torres* case from Judge McBryde to himself. On May 1, Judge Buchmeyer issued a second order vacating Judge McBryde's findings as to contempt and reassigning the *Satz* case from Judge McBryde to himself. Both orders were filed under seal. Judge Buchmeyer sealed the entirety of the *Satz* and *Torres* files. Both orders cited 28 U.S.C. § 137 as authority to reassign the cases. The timing of the events and the testimony of Judge McBryde before the Special Investigatory Committee suggest that Judge Buchmeyer did not have the transcripts, orders, or supporting documents available to him in either case when he entered his orders reassigning the cases to himself and vacating Judge McBryde's prior actions. Judge Buchmeyer testified that he spoke only with AUSA Umphres, never with Cerow or her attorney.

On May 3, Judge McBryde entered an order calling reassignment of the *Satz* case "rash conduct" and concluding that the May 1 order was "void in its entirety." On the same day, Judge McBryde signed a judgment of conviction and sentence for Satz. The next day, Chief Judge Buchmeyer issued an additional order resealing the entire Satz file, declaring Judge McBryde's May 3 order void in its entirety, and directing the clerk to file only materials signed by Judge Buchmeyer in the *Satz* case. By "dear colleague" letters dated May 1 and 4, Judge Buchmeyer informed the other judges of the Northern District of Texas of his actions.

On May 12, 1995, defendant Satz filed a petition for a writ of habeas corpus, stating that he currently stood imprisoned without having been sentenced. The petition recited that Chief Judge Buchmeyer had reassigned *Satz* to himself, but that Judge McBryde had signed the sentencing order. Two months later, Judge Buchmeyer denied Satz's petition on the ground that Judge McBryde had vacated the May 1 Buchmeyer reassignment order before signing the judgment of conviction and sentence, and Satz was thus imprisoned pursuant to a valid

judgment and sentence. Satz apparently did not appeal this ruling. *See Gray,* 105 F.3d 956.

On August 25, Judge Buchmeyer filed an opinion and order in the *Satz* case. The order reflects a review of the transcripts of the *Satz* hearings held on April 24-26. The order also relied upon a letter, written at the request of Chief Judge Buchmeyer, from Janet Napolitano, United States Attorney for the District of Arizona. The letter commented on the effects of Judge McBryde's orders. It is unclear what if any additional information was available to him, although it does not appear that Judge Buchmeyer heard additional sworn testimony.

Judge Buchmeyer found that the representations of AUSA Cerow and her attorney,as well as the statements made by Inspector Whiteaker, during the April 24-26 hearings were entirely truthful. He also stated that Judge McBryde's treatment of Judge Rosenblatt constituted an "unwarranted attack." The order described Judge McBryde's April 26 decision to unseal the text of the second motion to continue and attached documentation filed by AUSA Umphres on April 21 under seal. In a footnote, the order stated that "[a]ccording to *Janet Napolitano,* United States Attorney for the District of Arizona, this disclosure by Judge McBryde 'undermined the new [grand jury] *investigation since, by informing Satz of the nature of the Arizona investigation, the Court also informed the targets of that investigation. Consequently, several persons will probably avoid prosecution altogether . . ,' "* (alteration and italics in original).[3]

The asserted damage to the grand jury investigation was apparently due to the disclosure of information in the attachment to the April 21 motion. Attached as Exhibit A, the memorandum from AUSA Umphres to the Probation Office disclosed that certain defendants were cooperating in the investigation. On the basis of this disclosure, United States Attorney Napolitano and AUSA Cerow concluded that defen-

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[3]AUSA Cerow testified at the eventual hearing before the Special Investigatory Committee that at least one person, whom she did not identify, had escaped prosecution altogether.

dant Satz would warn the targets of the Arizona investigation and that those individuals would move or destroy documents, and therefore that they could not in good faith apply for a warrant to search for those documents. Curiously, this effect of Judge McBryde's order is asserted in spite of disclosures made by AUSA Umphres' first motion for a continuance, filed on April 4 not under seal and presumably served on Satz's attorney. This first motion had disclosed the fact that the Arizona investigation had focused in part on the Schwartz family, had generated a significant record, and had revealed the possibility that Satz was more involved in the criminal enterprise than had been previously believed. Documents filed before this court suggest that the docket sheets in the Schwartz family criminal prosecutions were available to the general public throughout the pendency of this litigation via an Arizona computer system. These docket sheets reflected the Schwartzes' guilty pleas and the sealing of their cases.

Judge Buchmeyer's order continued by stating that Judge McBryde had repeatedly rejected the government's suggestions that he call Judge Rosenblatt or grant a continuance. The order continued, "In lieu of a continuance, the government suggested that Judge McBryde review material in camera so that public disclosure would not be made. He rejected that option." Chief Judge Buchmeyer concluded the opinion by admitting that 28 U.S.C. § 137 did not grant him the power to "*reassign cases because of a disagreement with how a case was handled* ... [or] because litigants are disgruntled, or because of some desire to place [him]self in the role of a 'quasi-appellate court' that reviews the decisions made by other judges in this district" (italics in original). Labeling any such argument in this case "ridiculous," Judge Buchmeyer explained that this case was "*an extraordinary situation* " (italics in original) because Judge McBryde made an unwarranted attack upon Judge Rosenblatt and because Judge McBryde had jeopardized a grand jury investigation by unsealing information as a direct result of clearly erroneous findings of fact.

In a separate order also issued in August, Judge Buchmeyer granted the United States' previously filed "Motion for Clarification." The order recited the potential difficulties

under *Giglio v. United States,* 405 U.S. 150, 153-54, 92 S.Ct. 763, 765-66, 31 L.Ed.2d 104 (1972), and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), created by Judge McBryde's findings that AUSA Cerow and Inspector Whiteaker had lied while under oath. The order vacated these findings as having "no factual basis" and found that "AUSA Cerow and Inspector Whiteaker were at all times truthful in their dealings with Judge McBryde." This obviated the need for any effort to obtain review by this Court of Judge McBryde's order, the reason representatives of the United States Attorney's office consulted Judge Buchmeyer in the first place.

2

On July 21, Judge Buchmeyer filed another memorandum in the *Torres* case labeling the reassignment of that case necessary "to avoid public humiliation and damage to the District Clerk, as well as to the reputation of this Court." After detailing the facts, the Chief Judge referred to his opinion in *Satz* and again rested his reassignment order on 28 U.S.C. § 137.

D

After a meeting of the judges of the Northern District of Texas, about which the documents before us provide little information, Judge McBryde filed a "Request for Assistance in Resolution of Dispute" before the Fifth Circuit Judicial Council. Apparently, the Department of Justice also wrote Fifth Circuit Chief Judge Politz regarding *Satz.* Chief Judge Politz ordered that the Request for Assistance be referred to a "Special Investigatory Committee," which would also consider matters arising out of the DOJ's letter pursuant to 28 U.S.C. §§ 372(c)(1) & 372(c)(5). The committee, comprised of three circuit judges and two district judges, held a hearing on October 19. It heard testimony from Judge McBryde, but refused his request to be present at the taking of the testimony of witnesses, including Judge Buchmeyer. One member of the committee expressed concern that the transfers by Judge Buchmeyer could effect an end-run around the appellate process. In response, Judge Buchmeyer emphasized that an appeal of contempt in the *Torres* case would result in unacceptably damaging media exposure for Clerk Doherty and that he had a responsibility to

protect the clerk of his court, as well as Judge Rosenblatt, who might not have had any remedy for Judge McBryde's "abuses."

Clerk Doherty and AUSA Cerow also testified before the committee. The committee then presented a recommendation to the Fifth Circuit Judicial Council. The documents before us do not describe the nature of this untranscribed presentation.

On October 20, the Judicial Council denied Judge McBryde's Request for Assistance by an order stating:

> Our review of the record along with our independent investigation in these two cases overwhelmingly demonstrates that Judge Buchmeyer's factual predicate, on which he based his orders, was correct. Judge McBryde's conduct in both cases was unwarranted.
>
> In *Satz,* Judge McBryde's attack on AUSA Darcy A. Cerow and Postal Inspector Rex Whiteaker and his accusations against them of lying and contempt of court were baseless, threatening irreparable damage to the professional reputations and careers of both Ms. Cerow and Mr. Whiteaker. The record and our investigation confirm that the statements and conduct of AUSA Darcy Cerow and Postal Inspector Rex Whiteaker were truthful, professional, and appropriate under the circumstances. In addition, Judge McBryde's refusal to accord proper respect to the orders of another United States District Judge which sealed sensitive Rule 11 proceedings undermined a grand jury investigation.
>
> In *Torres,* our investigation and the record confirmed that Judge McBryde's conduct against Nancy Doherty, the clerk of the Northern District of Texas, was unwarranted, abusive, and threatened to damage Ms. Doherty's professional reputation. We are persuaded that Ms. Doherty took appropriate action upon being advised of the problems regarding the deposit of funds held for the minor and conducted the affairs of her office in a professional manner.
>
> We need not decide whether 28 U.S.C. § 137 authorized Chief Judge Buchmeyer's action in reassigning these cases because the Judicial Council unanimously concludes that Judge McBryde's above described conduct is an impediment to the effective administration of justice. Therefore under the authority of 28 U.S.C. § 332 we reassign *Satz* and

Torres to Chief Judge Buchmeyer effective May 1, 1995 and April 27, 1995.

Although Judge McBryde never acquiesced in the transfers, the Council did not seek enforcement of its order in the district court. In practical and real terms, enforcement of the Council's order had already been accomplished by the combined effect of the order of the district court and the later order of the Council, tailored to reach back to the original date of each of the district court's orders transferring the cases. Judge Buchmeyer, who already claimed that *Satz* and *Torres* were on his docket based on his power under § 137, retained the cases without entering any formal acknowledgment of the Council's reassignments.

II

We pause to note that the conflict between Judge McBryde on the one hand and Judge Buchmeyer and the Council on the other hand began as a struggle between conflicting interpretations of the facts. As we read the record, finders of fact could reasonably defend either side. The reasonableness of both understandings does not play a determinative role in our legal analysis, but appreciating the roots of this case leads to an appreciation of the power that the Chief Judge of the District and the Council exercised when they took the *Satz* and *Torres* cases away from Judge McBryde.

Chief Judge Buchmeyer and the Council chose to believe AUSA Cerow's insistence that Judge Rosenblatt's sealing order prohibited her from answering Judge McBryde's questions. Judge Rosenblatt's two faxes confirmed that there was a sealing order, and their curtness suggested that its scope was broad. From the point of view of Chief Judge Buchmeyer and the Council, Judge McBryde's reputation for running a tight ship made these litigants wary of giving him information, which in turn made Judge McBryde suspicious and caused an escalation of distrust. It was not unreasonable for Chief Judge Buchmeyer and the Council to attribute difficulties in the *Satz* case to misunderstandings and to give credence to AUSA Cerow based on the evidence of the sealing order and the presumption that an attorney would not fabricate the contents of a judicial order.

In *Torres,* Judge McBryde threatened Clerk Doherty with contempt based on her "insolence" and accused her of conspiring with the plaintiffs' attorney to institute a cumbersome remedy in violation of instructions from the court. As a behind-the-scenes participant, Judge Buchmeyer had valid reasons to dismiss Judge McBryde's suspicions. Indeed, he knew that he himself was the author of the remarks that Judge McBryde viewed as insolent. The Council adopted Judge Buchmeyer's view of Clerk Doherty's actions, seeing her as a well-meaning public servant attempting to smooth over a bureaucratic glitch.

But we cannot dismiss out of hand Judge McBryde's understanding of the facts in the *Satz* and *Torres* cases either. His suspicions in *Satz* were understandably heightened when, during the second day of hearings, Umphres stated that he did not know until the latter part of April that the Arizona U.S. Attorney's office was portraying the sealing order as protecting virtually every piece of information about the Arizona *Satz* litigation. In retrospect, Judge McBryde could piece together a number of facts that pointed to the larger conclusion that AUSA Cerow was lying. Umphres's first motion to continue sentencing was not filed under seal even though it mentioned the Schwartz family and the further investigations. Umphres's second motion to continue sentencing was filed under seal, but the attached letter from AUSA Cerow suspiciously neglected to mention any sealing order as a reason to keep the Arizona grand jury investigation a secret. Even after moving the hearing *in camera* and excluding Satz's counsel, AUSA Cerow and her attorney were extraordinarily reticent about information Judge McBryde needed for sentencing. They refused even to disclose the wording of the order. Judge Rosenblatt was understandably cautious. The result was that dispatches from Judge Rosenblatt were vague and hardly falsified Judge McBryde's hunch that AUSA Cerow was being less than forthright. At the April 25 proceedings, Judge McBryde delivered a cogent statement of his reasons for rejecting AUSA Cerow's reliance on a broad sealing order. His conclusion flowed not only from the implausibility of such an order and the fact that the government raised the

order long after it knew it would be relevant, but also from the demeanor of the witnesses and counsel's evasiveness.

Judge McBryde knew that AUSA Cerow had an incentive to delay sentencing in the Northern District of Texas. According to the government's own motions, sentencing in the Fort Worth case might, under Ninth Circuit law, limit the sentences available in the Phoenix case. Both the government and Judge Rosenblatt apparently expected Judge McBryde to hold off on sentencing in order to ensure that Satz would receive as much punishment as possible. The delaying tactics might also have been due to AUSA Cerow's interest in obtaining sentences in her case before the Northern District of Texas handed down sentences. We need not attribute paranoia or irrationality to Judge McBryde to explain his view that AUSA Cerow's contentions about the sealing order were untruthful. Even if there was a sealing order, there were legitimate reasons to think that its scope was not as sweeping as AUSA Cerow contended.

Judge McBryde's understanding of the factual basis for suspecting that Clerk Doherty was on the verge of contempt was similarly within the bounds of reason. He knew that the $40,000 had earned no interest because plaintiffs' counsel requested the clerk's office not to deposit the money in a U.S. account and that the clerk's office had complied, contrary to Judge McBryde's express order. He also knew that Clerk Doherty was cooperating with the Administrative Office to accomplish an end that his prior order rejected. Furthermore, from Judge McBryde's vantage point, Doherty did not respect his position enough to refrain from criticizing his earlier order in a letter to the court. Judge McBryde could have handled the matter more sensitively. We need not agree with his conclusion to conclude that his view of the letter as reflecting "insolence" was not irrational. It is evident that the tone of language used by the Chief Judge differed significantly from the tone Clerk Doherty would have preferred. She is an experienced clerk with an outstanding reputation. Part of her success has undoubtedly been an ability to handle the egos that sometimes flourish under the shelter of Article III. In short, the choice of language was no fault of the clerk, but Judge McBryde had no way to know that.

As in the *Satz* case, there was room for disagreement about whether those on the receiving end of Judge McBryde's barbs acted culpably.

III

Judge McBryde invokes 28 U.S.C. § 1651(a) in his petition for a writ of mandamus, and that is ultimately where our jurisdiction rests. Section 1651(a) authorizes this court to issue all writs "necessary and appropriate in aid of [its] jurisdiction." Establishing jurisdiction to entertain Judge McBryde's petition requires that we answer two questions. First, do we have jurisdiction to issue a writ to the Judicial Council? If not, can we entertain Judge McBryde's suit based on our jurisdiction over the Northern District of Texas? Only after we have established our jurisdiction to issue a writ can we examine the propriety of the orders to which Judge McBryde objects.

A

This court has joined the D.C. Circuit in interpreting section 1651(a) as not authorizing a court of appeals to issue a preemptory writ regarding a case over which it would never have appellate jurisdiction. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants,* 17 F.3d 130, 133 (5th Cir.1994) ("As we have no statutorily conferred jurisdiction over the actions of the Director, the All Writs Act would not provide this Court with jurisdiction to compel action by the Director."); *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 79-80 (D.C.Cir.1984); *In re Stone,* 569 F.2d 156, 157 (D.C. Cir.1978).[4]

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[4]These cases did not decide the inherent power of federal courts, power not emanating from § 1651(a), to issue preemptory writs to any official of the United States upon a showing of clear entitlement to relief. Such a power might be derived from the historical ability of the common law courts to compel the performance of ministerial duties by those, such as executive officials, whose actions are not normally the subject of appellate review. *See Chandler v. Judicial Council of the Tenth Circuit of the United States,* 398 U.S. 74, 111-117, 90 S.Ct. 1648, 1667-1670, 26 L.Ed.2d 100 (1970) (Harlan, J., concurring). However, we abstain from exercising any inherent power we may have in this case. Congress has expressed its preference that the district courts exercise this type of general power. *See* 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any

We have no direct appellate jurisdiction over the Council's order. We have only the jurisdiction that Congress grants us by statute. Despite the suggestionsof Justices Harlan, Black, and Douglas in *Chandler,* 398 U.S. at 111-117, 133-135, 90 S.Ct. at 1667-1670, 1679-1680,[5] the circuits have long since concluded that section 1651(a) is not an independent grant of jurisdiction.[6] Nor do we have appellate jurisdiction by virtue of some other statute. Section 372(c)(10) of Title 28 grants appellate jurisdiction over certain judicial council action to the Judicial Conference of the United States, not to this court.[7]

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action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."); *see also La Buy v. Howes Leather Co.,* 352 U.S. 249, 265-66, 77 S.Ct. 309, 318-19, 1 L.Ed.2d 290 (1957) (Brennan, J., dissenting). *But see In re Imperial "400" National, Inc.,* 481 F.2d 41, 42 (3d Cir.) (affirming a district court's conclusion that it lacked jurisdiction to mandamus a judicial council), *cert. denied,* 414 U.S. 880, 94 S.Ct. 71, 38 L.Ed.2d 125 (1973). To the extent that Judge McBryde wishes to invoke the modern analogy to the historical power of the common law courts, he has gone to the wrong court.

[5]*See also United States v. Malmin,* 272 F. 785, 791 (3d Cir.1921) (holding that the predecessor to § 1651, which did not include the "necessary in aid of their jurisdiction" language, provided the court with jurisdiction to issue a writ to an unlawfully ousted district judge ordering him to resume his duties).

[6]*See, e.g., White v. NFL,* 41 F.3d 402, 409 (8th Cir.1994), *cert. denied,* 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); *Telecommunications Research,* 750 F.2d at 77; *Baker Perkins, Inc. v. Werner & Pfleiderer Corp.,* 710 F.2d 1561, 1565 (Fed.Cir.1983); *Starbuck v. City & County of San Francisco,* 556 F.2d 450, 459 n.18 (9th Cir.1977); *Commercial Security Bank v. Walker Bank & Trust Co.,* 456 F.2d 1352, 1355 (10th Cir.1972); *see also Chandler,* 398 U.S. at 86, 90 S.Ct. at 1654 (majority opinion) ("As the concurring and dissenting opinions amply demonstrate, finding the prerequisites to support a conclusion that we do have appellate jurisdiction in this case would be no mean feat.").

[7]Note that if one treats the Council's action against Judge McBryde as a complaint under 28 U.S.C. § 372(c), in spite of the Council's failure to provide the procedural safe-guards specified in 28 U.S.C. § 372(c)(11), then Congress has made crystal clear its intent that the federal courts as such

Judge McBryde identifies no statute granting a right of review of Judicial Council action to this court, and we have found none.

Mandamus might lie if we view the Council as an administrative body subservient to the judiciary. A collection of employees facilitates the work of the courts. Clerks, sheriffs, and bailiffs are prime examples. The courts have power over these officers simply because they are instruments through which the courts function. Power springs in part from statute but also in part from the nature of the administrative services these officers perform and their inherently subordinate role within the system.

Some authority supports the theory that the Judicial Council is an administrative body subordinate to the Fifth Circuit. The *Chandler* court characterized judicial councils as administrative bodies in dicta. 398 U.S. at 86 n. 7, 90 S.Ct. at 1655 n. 7. On occasion, the circuits have agreed. *See, e.g., Henry v. United States,* 432 F.2d 114, 119-20 (9th Cir.1970) ("It is true that members of a Court of Appeals, meeting as a Judicial Council, exercise certain supervisory powers for the expeditious administration of the business of the courts within its circuit, but they act as a council, not a court."), *modified,* 434 F.2d 1283, *cert. denied,* 400 U.S. 1011, 91 S.Ct. 576, 27 L.Ed.2d 625 (1971); *see also In re Petition to Inspect & Copy Grand Jury Materials,* 735 F.2d 1261, 1271 (11th Cir.), *cert. denied,* 469 U.S. 884, 105 S.Ct. 254, 83 L.Ed.2d 191 (1984). In addition, the function assigned to the Council suggests that it is analogous to a clerk or a bailiff, in that both assist in the process of orderly decisionmaking accomplished by the court. *See* 28 U.S.C. § 332(d)(1) (providing that each judicial council should

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exercise no appellate jurisdiction. 28 U.S.C. § 372(c)(10) ("Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."). *See also United States v. Washington,* 98 F.3d 1159, 1164-65 & n. 2 (9th Cir.1996) (Kozinski, J., concurring) (noting that litigants who believe a judge suffers from a mental disability must complain to the circuit judicial council and can obtain review of the council's decision only from the Judicial Conference), *petition for cert. filed,* 65 U.S.L.W. 3713 (U.S. Apr. 7, 1997) (No. 96-1607).

make orders as necessary for the effective administration of justice).

The presence of circuit and district judges on the Council adds nothing to our power. It would not matter if the Council were composed of the nine members of the Supreme Court; when the Justices acted in their capacity as members of the Council, their power and role would be that of the Council, not of the Supreme Court.

Even if the Judicial Council often or even primarily acts as a subordinate administrative body, it acted as a court in this case. "'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.'" *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 477, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983) (quoting *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 224, 29 S.Ct. 67, 68, 53 L.Ed. 150 (1908)). That is exactly what the Council did here. *See In re Petition,* 735 F.2d at 1271 (holding that a judicial council disciplinary proceeding is closely analogous to a "judicial proceeding" within the meaning of Fed.R.Crim.P. 6(e)(3)(C)(i)).

Other characteristics of the Council's actions in this case suggest that this proceeding was judicial in nature. The Special Investigative Committee took sworn testimony and examined the records of actual cases. It issued an order transferring a case from one judge to another because of alleged misconduct, just as the circuits have done in the past. *See, e.g., United States v. Jacobs,* 855 F.2d 652, 656-57 (9th Cir.1988) (holding that a judge's misconduct in a particular case warranted reassignment). The stigmatizing effect of the comments issued in the context of the Judicial Council's order support an analogy to disbarment proceedings, which courts have characterized as judicial. *In re Palmisano,* 70 F.3d 483, 484-85 (7th Cir.1995) (characterizing disbarment proceedings as judicial while deciding whether an appeal from such proceedings lies to the circuit or to the circuit council), *cert. denied,* 517 U.S. 1223, 116 S.Ct. 1854, 134 L.Ed.2d 954 (1996). In this regard, it is no accident that all members of the judicial councils enjoy Article III status; separation of powers principles might not permit a body

otherwise composed to exercise some of the powers the Council has at its disposal, including those exercised in this case.

Whether the Judicial Council is an arm of the executive branch or the judiciary is irrelevant to the question of our appellate jurisdiction. *See Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 224, 29 S.Ct. 67, 68, 53 L.Ed. 150 (1908) (defining a "judicial inquiry"). Even if the Council functioned as an Article III body--a conclusion that one might reach on the basis of the Article III status of its members as well as the nature of the order it entered--it functioned as a body over which we lack *direct* appellate jurisdiction. By analogy, we lack jurisdiction over district courts outside of this circuit, and thus cannot issue mandamus running to them. The question of whether the Judicial Council is a judicial body, or functioned as a judicial body in this case, is of importance only if Judge McBryde should seek relief in the Supreme Court. *See Chandler*, 398 U.S. at 86, 111-117, 133-135, 90 S.Ct. at 1654-1670, 1678-1679.

We conclude that the facts presented in this case do not permit us to issue a writ of mandamus directly to the Council. We need not decide whether other cases might present circumstances amenable to the exercise of direct scrutiny of council decisions under the All Writs Act.

B

That we lack both direct appellate jurisdiction over the Council's order and inherent jurisdiction to issue a writ of mandamus directly to the Council as an administrative body of this court does not deprive us of jurisdiction to entertain Judge McBryde's petition for a writ of mandamus running to the Northern District of Texas or its Chief Judge. The All Writs Act gives us jurisdiction to issue a writ of mandamus to Chief Judge Buchmeyer. The inescapable fact is that orders issued under § 332 are enforceable only through the district court, and, of course, we can review the actions of the Northern District of Texas.

The Council's retroactive order transferring *Satz* and *Torres* to Chief Judge Buchmeyer could do nothing more than instruct the Northern District of Texas to enter such an order. The Council may issue necessary orders, but these two cases

were not pending before the Council. It is no empty formalism to acknowledge that the Council's orders are implemented by the district court. By necessity, the Council's order was a directive to the district court. Because the only orders transferring cases came from within the Northern District of Texas, our inability to issue a writ of mandamus to the Council does not stand in the way of our entertaining Judge McBryde's petition.

Practical mechanics aside, under the Council's organic statute, the order the Council entered in this case was a directive to the Northern District of Texas to put the Council's instructions into effect. Nothing in 28 U.S.C. §§ 331-335, which create and govern the judicial councils, can be read to empower the Council to issue a self-executing order transferring cases from one district court judge to another. Rather, judicial officers and employees of the circuit are to "promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d)(2). The statute requires that a judicial council look to the courts to enforce compliance with its orders; a council can remedy a failure to comply with its orders only by "institut[ing] a contempt proceeding in [a] district court in which the judicial officer or employee of the circuit who fails to comply with the order ... shall be ordered to show cause before the [district] court why he or she should not be held in contempt." *Id.* The mechanism in § 372 differs fundamentally from the mechanism in § 332. For example, § 372 contemplates council orders suspending further assignment of cases to a judge under investigation for misconduct. *See* 28 U.S.C. § 372(c)(6)(B)(iv). It does not mention enforcement through ordinary judicial channels.[8] Instead, it authorizes a council to notify a judge under investigation directly of its actions. 28 U.S.C. § 372(c)(6)(D). These separate statutory structures highlight the central role of the district court in effecting council decisions made under the rubric of § 332. Significantly, Congress has not withdrawn jurisdiction to consider the validity of council orders

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[8]There is one isolated exception to the absence of ordinary judicial enforcement from § 372. Section 332(d)(2) allows a council or a special investigative committee formed under § 372(c)(4) to pursue contempt proceedings to force compliance with a subpoena.

issued under § 332 for which enforcement is sought. By contrast, it did so with § 372 proceedings. *See Webster v. Doe,* 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear."); *Yakus v. United States,* 321 U.S. 414, 430-31, 64 S.Ct. 660, 669-70, 88 L.Ed. 834 (1944) (holding that Congress "gave clear indication that the validity of the Administrator's regulations or orders should not be subject to attack in criminal prosecutions").

Our jurisdictional analysis is unaffected by the fact that Judge Buchmeyer's orders were entered before the Council's decision. By affirming the factual predicate of transfer orders first issued by the district court and making its purported transfer orders effective on the dates of his original transfer orders, the Council has achieved enforcement of its retroactive order. Our jurisdiction in this case, then, runs not to a direct examination of the Council's order, but rather to an examination of the judicial officers' or employees' actions in implementing that order. Whatever the Council's order purported to do, the Council could not under § 332 itself move the cases over the objection of Judge McBryde to Chief Judge Buchmeyer.

We review the transfer of the cases as acts of officers of the Northern District of Texas, and we review the propriety of the Council's order only insofar as it may justify or fail to justify the officers' actions. *See In re Imperial "400" National, Inc.,* 481 F.2d 41, 42 (3d Cir.) (noting that a circuit court may indirectly review the action of a judicial council in the process of reviewing a district court's order), *cert. denied,* 414 U.S. 880, 94 S.Ct. 68, 38 L.Ed.2d 125 (1973).[9]

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[9]Although there is some authority to the contrary, the circuits have regularly met challenges to a judicial council's actions on the merits without hint that council decisions are immune from ordinary judicial scrutiny. *In re Burley,* 738 F.2d 981, 985 (9th Cir.1984); *White Motor Corp. v. Citibank, N.A.,* 704 F.2d 254, 262 (6th Cir.1983); *Hilbert v. Dooling,* 476 F.2d 355, 359-62 (2d Cir.), *cert. denied,* 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973); *Jimenez v. Aristeguieta,* 311 F.2d 547, 554 (5th Cir.1962), *cert. denied,* 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963). *But see In re Imperial "400",* 481 F.2d at 50 (Lumbard, J., dissenting) ("No district judge or panel of the Court of Appeals for the Third Circuit, no matter how

The Tenth Circuit has by mandamus voided assignment of a case to an improper district judge, as we would do here. *Utah-Idaho Sugar Co. v. Ritter,* 461 F.2d 1100 (10th Cir.1972); *Kerr-McGee Corp. v. Ritter,* 461 F.2d 1104 (10th Cir.1972). In *Utah-Idaho* and *Kerr-McGee,* a chief judge of a district assigned himself certain cases in violation of an order of the Tenth Circuit Judicial Council. The Tenth Circuit found that a "writ of mandamus is essential to continuation of fair division of cases within the District of Utah and in implementation of the prior orders of the Judicial Council." *Utah- Idaho,* 461 F.2d at 1104. Although the Tenth Circuit did not articulate a theoretical justification for the use of the mandamus device in these cases, such an articulation is not difficult. Since *La Buy v. Howes Leather Co.,* 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), the courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process. See also Mallard v. United States District Court, 490 U.S. 296, 309, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318 (1989) (describing the broad power available to the federal appellate courts under the supervisory writ doctrine). As we will illustrate, transferring *Satz* and *Torres* from Judge McBryde threatened the proper functioning of the judicial process here because reassignment of cases in response to disagreement with substantive rulings pertaining to those cases threatens the very structure of the federal court system. The Council is not an appellate court with a correlative power to transfer cases, and Chief Judge Buchmeyer as a district judge lacks the power of appellate review over his fellow district court judges.

Because Judge McBryde was not a litigant in either the *Satz* or *Torres* cases, the Council questions whether he has standing. Initially, we agree with Justice Harlan that this type of petition is a case or controversy in the constitutional sense. *See Chandler,* 398 U.S. at 106 n. 9, 90 S.Ct. at 1663 n. 9 (Harlan, J., concurring). Judge McBryde may not have a constitutionally protected property or liberty interest in his

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constituted, has the power to question the action of the Judicial Council of the Third Circuit.").

ability to adjudicate *Satz* and *Torres*. Nevertheless, his interest in deciding those cases free from the specter of interference, except by the ordinary process of appellate review, is one that Congress might constitutionally recognize and protect without running afoul of the limits of Article III. *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 576-77, 112 S.Ct. 2130, 2145-46, 119 L.Ed.2d 351 (1992). Moreover, the damage done to Judge McBryde's reputation, which probably would be redressed in part by a finding of this court that his actions were not within the power of Chief Judge Buchmeyer or the Judicial Council to remedy, 28 U.S.C. § 332(d)(1), is also sufficient to confer standing on Judge McBryde.

The fact that the district-court phases of the *Satz* and *Torres* matters have been completed is no barrier to our review of the transfers. In both cases, Judge McBryde was considering whether to issue contempt citations. That avenue will still be open to him if we return the cases to his docket. *See* 18 U.S.C. § 401; Fed.R.Crim.P. 42(b). At this stage, we make no comment on whether contempt proceedings would be wise. It is enough to note that Judge McBryde has the authority to make the initial determination of whether the conduct of AUSA Cerow or Clerk Doherty merits his further attention.

In sum, although this court lacks jurisdiction to issue mandamus to the Judicial Council, we have jurisdiction to issue mandamus to Chief Judge Buchmeyer and the officers of the Northern District of Texas insofar as we must do so "in aid of" the appellate jurisdiction of the Fifth Circuit. 28 U.S.C. § 1651(a). This follows from our conclusion that the Council has obtained enforcement by the district court insofar as its order rested on § 332. If we were to take the view that the Council has not obtained enforcement of its order by the district court and insist on the empty exercise of an application by the Council for enforcement, Chief Judge Buchmeyer's orders would stand alone because there would be no extant order of the district court enforcing the Council's order. As we will explain, his orders are not enforceable.

IV

Chief Judge Buchmeyer purported to exercise his authority under 28 U.S.C. § 137 when he assigned *Satz* and *Torres* to himself. That section provides:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

A plain reading of the statutory text requires us to answer two questions: First, whether there is a rule or order adopted either by the Northern District of Texas or the Judicial Council of the Fifth Circuit that governs the reassignment of cases; and, second, whether the chief judge's power to "assign the cases so far as such rules and orders do not otherwise prescribe" validates the assignment.[10]

While the parties point to no rule or order expressly governing the reassignment of cases in the Northern District of Texas, Special Order No. 3-130 provides that "civil and criminal cases in the Fort Worth Division will be assigned by random draw," with 44% of the Division's cases going to Judge McBryde.

Chief Judge Buchmeyer read Special Order No. 3-130 to govern only the initial assignment of cases in the Fort Worth Division, not their reassignment, a distinction we conclude to be too fine. In *Utah-Idaho,* the chief judge of the district reassigned several cases pending before a judge who had recently taken senior status. A litigant from one of the reassigned cases sought a mandamus from the Tenth Circuit directing the Chief Judge to reassign the case to the senior district judge. The

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[10]The Judicial Council's answer to Judge McBryde's petition for mandamus did not address the propriety of Chief Judge Buchmeyer's order.

Tenth Circuit granted the writ, but ordered the cases reassigned to the newly appointed judge who had succeeded the senior judge.

At the time *Utah-Idaho* was decided, the U.S. District Court for the District of Utah was operating under rules prescribed by the Tenth Circuit Judicial Council regarding the initial assignment of cases. Specifically, the Judicial Council's rules, much like Special Order No. 3-130 here, "required an equal and random division of civil cases and prescribed a system which balanced and apportioned the criminal, bankruptcy, immigration and naturalization cases." *Id.* at 1102. In holding invalid the chief judge's reassignment of cases, the Tenth Circuit rejected the chief judge's argument that the assignment rule did not cover the situation when an active judge takes senior status. To the contrary, the Tenth Circuit held that the chief judge's "act of choosing which cases to keep and which to assign to [the senior judge's successor] did not comply with the Council's mandate that the assignment of civil cases be equal and random, subject only to modification by written agreement of the active judges." *Id.* at 1104.

In short, the Tenth Circuit held that the initial assignment rule prohibited, by implication, the chief judge from reassigning cases already assigned to a particular judge. Special Order No. 3-130's provision for the random assignment of cases prohibits, by implication, a reassignment of those cases. It bears mention that § 137 requires that all the judges of the district agree on the "rules and orders."

A rule or order governing the reassignment of pending cases aside, Judge Buchmeyer lacked the power under § 137 to reassign *Satz* and *Torres*. Judge Buchmeyer urges that § 137 empowered him to reassign cases because Special Order No. 3-130 "does not cover the reassignment of cases -- which is done by the Chief Judge alone, not by an order signed by all of the District Judges." According to this argument, § 137 empowers the chief judge to assign cases subject only to the limits imposed by formally adopted rules and orders. Assuming for the purposes of this argument that Special Order No. 3-130 is either invalid or does not prohibit the reassignment of pending cases, Judge Buchmeyer's interpretation of § 137 seems

plausible: the second paragraph of the section empowers the Chief Judge to assign cases "so far as such rules and orders do not otherwise prescribe." *See Martinez v. Winner,* 771 F.2d 424, 434 (10th Cir.) (noting that the chief judge assigns the cases "when the rules and orders make no provision"), *modified,* 778 F.2d 553 (10th Cir.1985), *vacated,* 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 333 (1986).

This interpretation of § 137 creates two problems. First, not one case upholds reassignment of a pending case by a chief judge without the consent of the presiding judge. To the contrary, courts have been wary of endorsing a general reassignment power. For example, in *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, 1261 (5th Cir.1983), we held that the Chief Judge of the Eastern District of Texas lacked the power under § 137 to reassign a case in which he had recused himself, even though no local rule prohibited such a reassignment. We noted that the appearance of impropriety counseled against allowing the recused judge, even the chief judge with the § 137 power to assign cases, to reassign the case.

Second and more to the point, the argument proves too much. Under the reading Judge Buchmeyer proposes, nothing prevents a chief judge from reassigning cases to himself where he disagrees with the substance of a ruling made by the presiding judge. But that power is antithetical to and incompatible with the structure of the federal judicial system.[11] "No express or implied power is granted a chief judge to affect administratively, directly or indirectly, litigation assigned to and pending before another judge of the court." *United States v. Heath,* 103 F.Supp. 1, 2 (D.Haw.1952); *see also In re Brown,* 346 F.2d 903, 910 (5th Cir.1965) ("[O]rderly procedure, of course, forbade Judge Cox to interfere with the handling of a case assigned to Judge Mize."). Although Chief Judge Buchmeyer disclaims the authority to reassign cases because of a disagreement with "how

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[11] "[T]he structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction." *Dhalluin v. McKibben,* 682 F.Supp. 1096 (D.Nev.1988).

a case was handled," his interpretation of § 137 has no such limitation.

The reassignment of *Satz* and *Torres* differs significantly from a chief judge's acknowledged power to reassign cases in situations involving the recusal, death, disability, or new appointment of a judge. In those cases, the reassignment is purely administrative, involving no review of the merits of the presiding judge's orders. *See Hvass v. Graven,* 257 F.2d 1, 5 (8th Cir.) (noting that the chief judge, who reassigned a case originally adjudicated by a judge whose temporary designation to that district had lapsed, "did not revoke his old order nor withdraw the case from Judge Mickelson and assign it to Judge Hicklin. He merely in due course as an administrative act routinely assigned the case on his docket and assigned it to the only judge, aside from himself, who then had power to exercise the jurisdiction of the court."), *cert. denied,* 358 U.S. 835, 79 S.Ct. 58, 3 L.Ed.2d 72 (1958). In this case, Chief Judge Buchmeyer's own opinion forthrightly discloses that his actions were prompted entirely by his disagreement with Judge McBryde's conduct of the two cases.

In short, § 137 provides the chief judge of a district with broad authority to assign cases; however, that authority is circumscribed by powerful limits. This particular limit lies at the core of both the statutory structure of the federal courts and Article III's command of judicial interpretation. Implicit within that grant of power is the limitation that the chief judge cannot sit as a quasi-appellate court and review the decisions of other judges in the district via his § 137 assignment power.

V

The precise limits of a judicial council's authority under § 332(d)(1) are uncertain. The Court in *Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 85 n. 6, 90 S.Ct. 1648, 1654 n. 6, 26 L.Ed.2d 100 (1970), observed that "[s]tanding alone, § 332 is not a model of clarity in terms of the scope of the judicial councils' powers." Deciding this case does not require an exact definition of the boundaries of the Council's power under § 332(d)(1). Whatever its power, the Judicial Council exceeded it here.

We investigate three questions to reach our conclusion: first, whether the Judicial Council has the authority to remedy judicial misconduct pursuant to § 332; second, if so, whether that power includes the authority to censure a judge for judicial misconduct; and third, whether the Judicial Council here censured judicial misconduct.

A

Congress created the judicial councils in 1939. *See* Pub.L. No. 76- 299, § 306, 53 Stat. 1223 (1939). Originally codified at 28 U.S.C. § 448, that legislation provided in pertinent part:

> To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside.... It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts.

In 1948, Congress recodified this provision at 28 U.S.C. § 332 and revised its language. The new § 332 provided in pertinent part that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." This language remained unaltered for over 30 years.

In *Chandler,* the Supreme Court confronted a challenge to a judicial council's power under § 332. The Judicial Council of the Tenth Circuit initially issued an order reassigning pending cases before Judge Chandler to other judges and prohibiting the assignment of cases to Judge Chandler in the future. The basis for the Judicial Council's order was Judge Chandler's inability to "discharge efficiently the duties of his office." The Judicial Council subsequently authorized Judge Chandler to retain cases pending before him but continued to prohibit the assignment of new cases to the judge. Judge Chandler sought a mandamus from the Supreme Court to the Judicial Council.

The Court denied the writ. It declined to exercise its jurisdiction to issue the writ where other avenues of relief were open. Judge Chandler's refusal to seek an order providing for the assignment of new cases, either via unanimous agreement with his fellow district judges or via judicial council order, persuaded the Court that Judge Chandler "has not made a case for the extraordinary relief of mandamus or prohibition." 398 U.S. at 89, 90 S.Ct. at 1657.

Concurring in the denial of the writ, Justice Harlan disagreed with the Court's jurisdictional analysis. He concluded that judicial councils possess the authority under § 332 to prohibit the assignment of cases to a judge whose conduct threatens public confidence in the judiciary. Justice Harlan noted the unquestioned authority of the judicial councils to "channel" cases to other judges when necessary. *Id.* at 121, 90 S.Ct. at 1673. Responding to Judge Chandler's argument that the Judicial Council lacked the power to reassign cases so as to "punish Judge Chandler for misbehavior," Justice Harlan wrote that there was no indication that the Council entered its order out of personal animosity. *Id.* at 122, 90 S.Ct. at 1673. Justice Harlan also disagreed with Judge Chandler that only a backlog of cases justified the Council's assignment order:

> It is true, as the legislative history ... confirms, that abatement of delays in disposition of cases was a principal purpose for creation of the Councils; but the Councils were deliberately given broad responsibilities to meet other problems as they arose. Chief Justice Groner contemplated that the Councils would cope not only with delays but also with "any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which [a district judge] may be responsible."

Id. at 123, 90 S.Ct. at 1673. Pointing out that Judge Chandler had been a party defendant in both civil and criminal litigation and that he had been ordered to recuse himself in one case, Justice Harlan concluded that all of the circumstances, "taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice." *Id.* at 125, 90 S.Ct. at 1674.

The significance of Justice Harlan's discussion of the merits lies in his conclusion that § 332 authorizes judicial councils to respond to judicial conduct that threatens public confidence in the judiciary. It is true that Justice Harlan wrote only for himself and that Justices Black and Douglas vigorously disagreed with Justice Harlan on this point. *See id.* at 142, 90 S.Ct. at 1683 (Black, J., dissenting). Nonetheless, Justice Harlan's concurrence demonstrates that, at bare minimum, it is not unreasonable to view § 332 as empowering a council to remedy judicial misconduct.

B

Few decisions treat the boundaries of a judicial council's power to remedy judicial misconduct pursuant to § 332. Cases affirming a judicial council's exercise of its power under § 332 typically involve judicial council rules promulgated to alleviate judicial delay or prevent "chaos."[12] In 1978, the Ninth Circuit Judicial Council invoked its power under § 332(d)(1) and adopted the Procedures for Processing Complaints of Judicial Misconduct. *See In re Charge of Judicial Misconduct,* 593 F.2d 879 (9th Cir.1979). The Ninth Circuit observed that these rules were "designed to provide an administrative remedy for misconduct of a judge for which no judicial remedy was available." *In re Charge of Judicial Misconduct,* 595 F.2d 517, 517 (9th Cir.1979). Significantly, however, the Judicial Council points to no case censuring a judge pursuant to § 332.

Prior to 1980, the question whether a judicial council had the power under § 332 to censure a judge for judicial misconduct was open to debate. In 1980, however, Congress enacted the Judicial Councils Reform and Judicial Conduct and

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[12] *See White Motor Corp. v. Citibank, N.A.,* 704 F.2d 254, 262 (6th Cir.1983) (upholding a judicial council's promulgation pursuant to § 332 of interim bankruptcy rules "as emergency measures to prevent the collapse of the bankruptcy system" in wake of *Northern Pipeline*); *Hilbert v. Dooling,* 476 F.2d 355, 359-60 (2d Cir.) (en banc) (upholding a judicial council's promulgation pursuant to § 332 of Prompt Disposition Rules regarding pre-trial delay in criminal cases), *cert. denied,* 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973); *see also In re Jury Plan of the Eastern District of New York,* 61 F.3d 119, 121-22 (2d Cir. Jud.C. 1995) (reviewing a proposed jury plan under § 332).

Disability Act of 1980, Pub.L. No. 96-458, 94 Stat.2035 (1980). That legislation amended § 332(d)(1) to read as it does presently. More importantly, that act added § 372(c), which creates a detailed process for the investigation and discipline of a judge whose conduct is "prejudicial to the effective and expeditious administration of the business of the courts." Section 372(c)(6)(B) enumerates the sanctions that a judicial council may impose in such circumstances and includes public and private censures or reprimands.

Judge McBryde and the Judicial Council disagree about the effect of Congress' creation of § 372(c) in 1980. According to Judge McBryde, Congress intended § 372(c) to be the sole mechanism by which judicial councils could censure judges. The Judicial Council responds that, prior to 1980, § 332 empowered it to censure as a way of remedying judicial misconduct and that Congress did not intend by enacting § 372(c) to narrow the scope of its power under § 332.

There is some support for the Judicial Council's interpretation. Well after the passage of the 1980 legislation, *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 435 & n. 2, 105 S.Ct. 2757, 2763 & n. 2, 86 L.Ed.2d 340 (1985), explained that an attorney whose reputation had been egregiously injured by a district judge's decision to disqualify him "might be able to obtain relief from the Circuit Judicial Council pursuant to 28 U.S.C. § 332(d)(1)." The Court added that the judicial councils "exist 'to provide an administrative remedy for misconduct of a judge for which no judicial remedy is available.' " *Id.*

Ultimately, however, we conclude that whatever power the Judicial Council possesses under § 332 to remedy judicial misconduct, that power does not include the authority to censure or reprimand a judge for that misconduct. Stated bluntly, Congress has distinguished between remedying judicial misconduct and censuring a judge for that misconduct. By the same token, it has distinguished between transferring cases for administrative reasons and vacating judicial findings. While § 332 grants the judicial councils some authority to deal with judicial misconduct, the Judicial Council's authority to impose discipline based on its finding of misconduct is limited to that power conferred by § 372(c).

The history of the 1980 legislation confirms this reading of the statutory structure. The House Report describes the various types of actions § 332(d) authorizes the Judicial Council to take. These largely administrative functions include:

> assigning judges to congested districts, and to particular kinds of cases; developing rules for assigning judges within congested divisions having more than one federal court facility to the end that cases be tried, so far as practical, in the division in which such cases originate; directing them to assist infirm judges; ordering them to decide cases long held under advisement, requiring a judge to forego his summer vacation in order to clear his congested docket, compelling multi-judge courts to arrange staggered vacations, and setting standards of judicial ethics.

H.R.Rep. No. 1313, 96th Cong., 2d Sess. 9 (1980). The House Report referred to the proposed amendment to § 372 as containing "the core of the proposed judicial misconduct and disability legislation." *Id.* The Report added that "it was appropriate to place the increased disciplinary functions of the councils in [§ 372]." *Id.*

In short, both the legislative history and the structure of the statute suggest that the Judicial Council's power under § 332 does not include the authority to censure judges for misconduct. Indeed, § 372(c) is redundant surplusage under the Judicial Council's interpretation of § 332. On that view, a judicial council bent on censuring a judge need not call on the cumbersome procedures of § 372(c); it may invoke its power under § 332.

Koller's statement that § 332 exists to remedy a docket problem even though it springs from judicial misconduct does not suggest the broader authority to censure a judge for that misconduct. The Court cited two Ninth Circuit decisions involving pre-1980 misconduct proceedings to support the proposition that § 332 empowers the judicial councils to remedy difficulties created by judicial misconduct. Those decisions, both of which dismissed the charge of judicial misconduct, did not suggest that a council has the authority under § 332 to censure a judge for misconduct. Indeed, since 1980, the Ninth Circuit appears to use § 372(c) rather than § 332 as the frame-

work for investigating charges of judicial misconduct and assessing appropriate sanctions. *See In re Charge of Judicial Misconduct,* 685 F.2d 1226, 1227 (9th Cir. Jud.C. 1982) (dismissing a § 372(c) complaint); *In re Charge of Judicial Misconduct,* Nos. 93-80015 & 93-80288 (9th Cir. Jud.C. 1994) (attached to Judicial Council's brief). We con-clude that the Judicial Council lacks the power under § 332(d) to censure a judge for judicial misconduct.

C

We have no doubt that by any objective measure the Judicial Council's reassignment of *Satz* and *Torres,* accompanied by the vacating of Judge McBryde's findings and the entry of starkly contrary findings, was a strong censure of Judge McBryde for his conduct in those cases. The Council's decision regarding his "conduct" required a judgment as to whether his understanding of the facts should prevail. The Judicial Council lacks the power to censure a judge under § 332, nor may it order a case reassigned based on its disagreement with the district judge's factual findings. *See United States v. Washington,* 98 F.3d 1159, 1165 n. 1 (9th Cir.1996) (Kozinski, J., concurring) ("[O]ur judicial council has stated repeatedly that it may not address any matter that concerns the merits of a case and might be raised through normal channels of appellate review."), *petition for cert. filed,* 65 U.S.L.W. 3713 (U.S. Apr. 7, 1997) (No. 96-1607).

The power to reassign pending cases is an extraordinary one. Courts of appeals may reassign a case pursuant to 28 U.S.C. § 2106 as part of a remand order, though that remedy is rarely invoked. *See, e.g., United States v. Microsoft Corp.,* 56 F.3d 1448, 1463 (D.C.Cir.1995) (per curiam). In contrast, 28 U.S.C. § 372(c)(6)(B)(iv) does not expressly empower a judicial council to reassign *pending* cases; rather, it only authorizes a judicial council, upon a finding of judicial misconduct pursuant to that section, to order "on a temporary basis for a time certain, no *further* cases be assigned" to the disciplined judge (emphasis added).

We have found no case--and the Judicial Council has not pointed us to one--upholding the power of a judicial council to reassign pending cases as a reprimand for judicial misconduct.

In *Chandler,* the Judicial Council initially ordered the reassignment of pending cases but later modified its order to permit Judge Chandler to continue hearing cases already before him. Indeed, such a power would pose constitutional questions regarding the exclusivity of congressional power to remove a sitting federal judge. *See In re Matter of Certain Complaints Under Investigation,* 783 F.2d 1488, 1510 (11th Cir.) (reserving the question of the constitutionality of a judicial council's power to forbid further assignment of cases to a judge on a temporary basis for a time certain), *cert. denied,* 477 U.S. 904, 106 S.Ct. 3273, 91 L.Ed.2d 563 (1986).

Concluding that a judicial council may not censure a judge by reassigning pending cases pursuant to § 332(d) does not mean that the Judicial Council lacks the authority under § 332 to reassign cases for administrative reasons. In *Jimenez v. Aristeguieta,* 311 F.2d 547 (5th Cir.1962), *cert. denied,* 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963), we upheld the authority of the Judicial Council to reassign a pending extradition proceeding to another judge. In that case, Venezuela sought the extradition of its former president, Marcos Gamines. Judge Mathes of the U.S. District Court for the Southern District of California, who was sitting by designation in Miami, issued an arrest warrant for Gamines. Judge Mathes' assignment to the Southern District of Florida evidently lapsed during the extradition proceedings, and the Judicial Council for the Fifth Circuit ordered the reassignment "to some other judge" of any "unfinished business" of Judge Mathes. Chief Judge Whitehurst subsequently ordered the reassignment of Gamines' case to himself. Chief Judge Whitehurst ordered Gamines confined pending extradition by the Secretary of State. Gamines sought a writ of habeas corpus and argued, *inter alia,* that the reassignment was invalid because Chief Judge Whitehurst did not have jurisdiction to enter the order of commitment.

We disagreed. Citing the Judicial Council's power under § 332, we concluded that "[t]his extradition proceeding was 'the business of the courts' and Judge Whitehurst's assignment to hear the evidence of criminality under the order of the Judicial Council of the Fifth Circuit and Chief Judge Whitehurst's order was a proper exercise of their authority." *Id.* at 554. Signifi-

cantly, however, we noted that "[t]he reassignment did not constitute any attempt to review any action of Judge Mathes as extradition magistrate." *Id.*

Had the Council proceeded under § 372(c)(3), it would have been confronted by the reality that the complaint of judicial misconduct was "directly related to the merits of a decision or procedural ruling." In *In re Charge of Judicial Misconduct,* 685 F.2d 1226, 1227 (9th Cir. Jud.C. 1982), a judicial council dismissed a complaint filed under § 372(c) because the statute required the dismissal of "complaints of judicial misconduct which in substance are simply objections to substantive or procedural error." The Council observed that "[e]ven if there were multiple legal errors in the handling of this case, ... such matters were entirely cognizable in the ordinary course of appellate review." *Id.*[13] *See also In re Charge of Judicial Misconduct,* 613 F.2d 768, 769-70 (9th Cir.1980) (dismissing complaint).

This limit, which is expressed within § 372(c), is implicit with § 332(d)(1). Stated another way, it would make no sense for Congress to prohibit a judicial council from reviewing the merits of an individual judge's conduct pursuant to § 372(c) but permit that same review pursuant to § 332(d). Indeed, even when the Ninth Circuit was operating under its Procedures for Processing Complaints of Judicial Misconduct, which were promulgated pursuant to § 332(d), it did not understand those procedures as empowering a judicial council "to pass upon allegations relative to a judge's disposition of a particular piece of litigation, absent any suggestion of corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office." *In re Charge of Judicial Misconduct,* 593 F.2d at 881.

The argument that the 1980 amendments to § 372 effectively eliminated the power of judicial councils to address judicial misconduct under § 332 is powerful. Remedying

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[13]The Council did, however, hold out the possibility of an "exceptional case developing where the nature and extent of the legal errors are so egregious that an inference of judicial misconduct might arise, but that would be a rare case, and it has not occurred here." 685 F.2d at 1227.

judicial misconduct will ordinarily amount to a censure. We need not decide, however, at what point findings of misconduct supporting a remedy of transferring cases become a censure of the judge beyond the authority granted by § 332. At the least, that authority does not extend to findings of misconduct that require the invalidation of factual findings made by an Article III judge in a case pending before him and over which he has jurisdiction.

We do not suggest that the Judicial Council set out to review the merits of Judge McBryde's decision. There is no question but that the Council responded to what it perceived to be improper and abusive acts by a trial judge. Significantly, the line between the merits of a decision and the judge's conduct in reaching the decision is not always easily found. *Compare In re Charge of Judicial Misconduct,* No. 93-80015 (9th Cir. Jud. C. 1994) (sanctioning a judge for making intemperate and abusive remarks from the bench) *with Petition of Lauer,* 788 F.2d 135 (8th Cir. Jud.C. 1985). In the latter case, the Eighth Circuit Judicial Council dismissed a charge of judicial misconduct brought under § 372(c). The complaint charged that a district judge made inappropriate remarks during the sentencing of several defendants. In comments equally applicable to this case, Chief Judge Lay observed:

> The Judicial Conduct and Disability Act should not be invoked so as to chill the independence of a trial judge in a judicial proceeding. A trial judge should not fear that because of comments he or she makes from the bench, which in good faith the judge feels are related to the proceeding before the court, he or she ultimately may be subject to a disciplinary sanction by the Judicial Council. Disenchanted litigants or other citizens should not be able to attempt to influence a federal judge about a judicial decision through the threat of disciplinary sanction. This is clearly not what Congress intended in passing the Act.

Id. at 138.

VI

We conclude that Chief Judge Buchmeyer's and the Judicial Council's orders were not limited to providing a remedy for misconduct because they rested on the invalidation of

judicial findings in a pending case and constituted a censure of the judge. We grant the petition for a writ of mandamus on this ground and vacate the reassignment orders. The cases will be returned to Judge McBryde's docket. Whether, in light of the events here described and the misunderstandings of which they are a part, he wishes to retain the cases or recuse is left in the first instance to his judgment as an Article III judge. We do not reach the additional claim that the Judicial Council violated Judge McBryde's Fifth Amendment right to due process.

The petition for mandamus is GRANTED.

EMILIO M. GARZA, Circuit Judge, specially concurring:

I concur in Judge Higginbotham's excellent opinion, but would not reach the issues in Part III.A.

DENNIS, Circuit Judge, specially concurring:

I respectfully concur in the essential elements and result of the majority opinion.

Because we do not have appellate jurisdiction to review an order of the Judicial Council, as the majority observes, the question of whether we can issue a writ to the Judicial Council in aid of such non-existent jurisdiction seems to answer itself. However, because it is not necessary to consider the question in the present case, I do not join in Part III A of the majority opinion devoted to an inconclusive and, I believe, unprofitable discussion of the subject.

Due to the fact that Chief Judge Buchmeyer's orders clearly lie within our appellate jurisdiction, we may issue writs to the district court in aid of that jurisdiction, unless the Judicial Council's order constitutes a valid administrative or disciplinary order that subsumed and removed the subject matter of Chief Judge Buchmeyer's orders from our appellate jurisdiction. For essentially the same reasons assigned by the majority, I conclude that the Judicial Council's order was not a product of actions confined to matters within its delegated administrative or disciplinary authority but extended to matters that bear directly on the decision of individual cases. Consequently, the

Judicial Council order was ineffective as a valid administrative or disciplinary order and was not capable of removing Chief Judge Buchmeyer's orders from our appellate jurisdiction.

As the majority opinion makes clear in Part III B and succeeding parts, Chief Judge Buchmeyer exceeded the lawful exercise of his prescribed jurisdiction in taking the cases from Judge McBryde and reassigning them to himself. Accordingly, I join in the majority's decree insofar as it grants a writ of mandamus to the district court, vacates that court's reassignment orders, and returns the cases to Judge McBryde's docket.